

1 DANIEL A. McDANIEL SBN 77363
2 NOMELLINI, GRILLI & MCDANIEL
3 PROFESSIONAL LAW CORPORATIONS
4 235 East Weber Avenue
5 P. O. Box 1461
6 Stockton, California 95201-1461
7 Telephone: (209) 465-5883
8 Facsimile: (209) 465-3956

9 JOHN HERRICK SBN 139125
10 4255 Pacific Avenue, Suite 2
11 Stockton, California 95207
12 Telephone: (209) 956-0150
13 Facsimile: (209) 956-0154

14 Attorneys for Applicants for Intervention

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

17 COALITION FOR A SUSTAINABLE DELTA,)
18 BELRIDGE WATER STORAGE DISTRICT,)
19 BERRENDA MESA WATER DISTRICT, LOST)
20 HILLS WATER DISTRICT, WHEELER)
21 RIDGE-MARICOPA WATER STORAGE)
22 DISTRICT, AND DEE DILLON,)

23 Plaintiffs,)

24 vs.)

25 JOHN CARLSON, JR., in his official capacity as)
26 Executive Director of the California Fish and)
27 Game Commission, RICHARD ROGERS, in his)
28 official capacity as President of the California)
29 Fish and Game Commission, CINDY)
30 GUSTAFSON, in her official capacity as Vice)
31 President of the California Fish and Game)
32 Commission, JIM KELLOGG, in his official)
33 capacity as Member of the California Fish and)
34 Game Commission, MICHAEL SUTTON, in his)
35 official capacity as Member of the California Fish)
36 and Game Commission, CALIFORNIA FISH)
37 AND GAME COMMISSION, JOHN)
38 MCCAMMAN, in his official capacity as Interim)
39 Director of the California Department of Fish and)
40 Game, and CALIFORNIA DEPARTMENT OF)
41 FISH AND GAME,)

42 Defendants.)

Case No. 1:08-CV-00397-OWW-GSA

**CENTRAL DELTA WATER
AGENCY, ET AL.'S NOTICE OF
MOTION AND MOTION TO
INTERVENE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO
INTERVENE**

DATE: June 2, 2008
TIME: 10:00 a.m.
COURTROOM: 3
JUDGE: Hon. Oliver W. Wanger

1 CENTRAL DELTA WATER AGENCY, SOUTH)
2 DELTA WATER AGENCY, HONKER CUT)
3 MARINE, INC., RUDY MUSSI, AND ROBERT)
4 SOUZA,)
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Applicants for Intervention.

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NOTICE OF MOTION AND MOTION TO INTERVENE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Notice is hereby given that on June 2, 2008, at 10:00 a.m., or as soon thereafter as counsel may be heard by the above entitled Court, located in Courtroom Three, United States Courthouse, 2500 Tulare Street, Fresno, California, the applicants Central Delta Water Agency, South Delta Water Agency, Honker Cut Marine, Inc., Rudy Mussi, and Robert Souza, (collectively “Applicants”) will and hereby do move for leave to intervene as defendants in the above-entitled action.

Applicants seek an order granting them leave to intervene as defendants in the above-entitled action, as a matter of right, Rule 24(a) of the Federal Rules of Civil Procedure, and alternatively, as a matter of permission pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. This motion is based upon this Notice of Motion and Motion to Intervene, the following Memorandum of Points and Authorities in Support of Motion to Intervene, the Appendix to Motion to Intervene, the declarations of Rudy Mussi, Rodney Karnofel, Robert Souza, Sr., and Jerry Robinson, the proposed answer, the proposed order, all pleadings and papers on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

Dated: April 15, 2008

NOMELLINI, GRILLI & McDANIEL
PROFESSIONAL LAW CORPORATIONS

By: /s/ Daniel A. McDaniel
DANIEL A. McDANIEL
Attorneys for Applicants for Intervention

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

3 **I.**

4 **INTRODUCTION**

5 Applicants Central Delta Water Agency, South Delta Water Agency, Honker Cut Marine,
6 Inc., Rudy Mussi, and Robert Souza (collectively “Applicants”) seek to intervene in this action
7 under the mandatory and permissive categories of intervention set forth in Rule 24 of the Federal
8 Rules of Civil Procedure.

9 This action challenges the adoption and enforcement of sportfishing regulations for striped
10 bass in the Sacramento-San Joaquin Delta (“Delta”) adopted by the California Fish and Game
11 Commission (“CFGC”) and enforced by the California Department of Fish & Game (“CDFG”).
12 Plaintiffs Coalition for a Sustainable Delta, Belridge Water Storage District, Berrenda Mesa
13 Water District, Lost Hills Water District, Wheeler Ridge-Maricopa Water Storage District, and
14 Dee Dillon (collectively “Coalition”) claim these actions are improper primarily due to the claim
15 that the protections afforded striped bass, and the alleged predation by the striped bass on certain
16 fish species protected by the Endangered Species Act (“ESA”), including the Delta smelt,
17 constitute the take of such protected species and violate the ESA. 16 U.S.C. section
18 1538(a)(1)(b).

19 In the Complaint for Declaratory And Injunctive Relief (“Complaint”), the Coalition
20 alleges facts relating to the causes for the decline of the Delta ecosystem. (Complaint, para. 11-
21 14.) The Coalition alleges “The overall health of the Delta ecosystem, including the health of the
22 populations of various species in the Delta, is in decline due to a number of factors, including
23 degradation of water quality due to urban and agricultural runoff to Delta waterways, introduction
24 of invasive and predatory species into the Delta ecosystem, water withdrawals from the Delta . . . ,
25 climate change, and other factors.” (*Id.*, para. 11.) The Coalition further alleges “Some special
26 interests have attributed many of the problems in the Delta, including the decline in the health of
27 species such as the delta smelt, to the pumps that provide water to the SWP and CVP systems.”
28 (*Id.*, para. 14.) The Coalition contends, however, that “there are many other factors that are

1 significant contributors to the decline in the Delta ecosystem, including predation of the Federally-
2 Protected species by non-native species, such as the striped bass.” Id.

3 Applicants seek to intervene in this action to protect their respective and collective
4 governmental, commercial, agricultural, recreational, and aesthetic interests in the Delta region
5 and its environs, including but not limited to the lands, waters, fisheries, and other aspects of the
6 Delta ecosystem. Each of the applicants has a cognizable and vital interest in the health of the
7 Delta ecosystem, and striped bass. These interests cannot be adequately protected by the existing
8 parties to this action, as none of them have the same cognizable interest, nor the same motivation.

9 Striped bass, and sportfishing for striped bass, result in commercial, recreational, and
10 aesthetic interests in the Delta in which applicants have varying interests, as they do in the overall
11 water quality and the health of the Delta ecosystem which the Coalition has put in issue.

12 Applicants move to intervene in this action pursuant to Federal Rule of Civil Procedure
13 24(a),¹ governing intervention as of right, or in the alternative, for permissive intervention under
14 Rule 24(b). Applicants seek intervention for the purpose of joining with the defendants in
15 defending against the claims of the Coalition.

16 In this case neither the Coalition nor the state of California has made an issue of the
17 provisions for the protection and promotion of populations of striped bass made in the Central
18 Valley Project Improvement Act (“CVPIA”), Pub.L. 102-575, 106 Stat. 4600, Title 34, 106 Stat.
19 4706-31 (1992), section 3403(a) and 3406(b)(1); (b)(1)(B); (b)(8), (9), (14), (18), (19), and (21);
20 (c)(1); (e)(1) and (5); (f); and (g)(4)(7), submitted as an Appendix to Motion to Intervene.
21 Applicants would raise this issue. Proposed Answer of Defendants in Intervention, p. 13, first
22 affirmative defense.

23 Applicants should be allowed to intervene as a matter of right pursuant to Rule 24(a)(2)
24 because their motion is timely, they have significant protectable interests relating to the striped
25 bass policies and regulations that are the subject of this action, Applicants are so situated that the
26 disposition of this action may impair or impede their ability to protect those interests, and

27 _____

28 1. Unless otherwise specified, all references to “Rule” refer to the Federal Rules of Civil Procedure.

1 Applicants' interests are not adequately represented by the existing parties. In the alternative,
2 Applicants should be granted permissive intervention pursuant to Rule 24(b)(2), since they have
3 claims involving questions of law and fact in common with the existing action.

4 **II.**

5 **STATEMENT OF THE ISSUES TO BE DECIDED**

6 1. Under this motion, the Court is requested to decide whether to grant to Applicants
7 leave to intervene in this action pursuant to Rule 24(a)(2).

8 2. Under this motion, the Court is requested to decide whether to grant to the
9 Applicants leave to intervene in this action pursuant to Rule 24(b)(2).

10 Applicants conferred with legal counsel for the existing parties as to their position
11 regarding the Applicants' intervention. Counsel for the Coalition indicated that they would not
12 stipulate to intervention at this time. Counsel for the defendants stated that they would agree not
13 to oppose intervention.

14 **III.**

15 **BACKGROUND AND STATEMENT OF FACTS**

16 **A. Related Cases and Nature of the Coalition's Case.**

17 On March 17, 2008, this court made its Order Relating and Transferring Case, As Related
18 to Case 1:05-cv-01207-OWW-GSA, *NRDC v. Kempthorne* and Case 1:06-cv-00245-OWW-GSA,
19 *PCFFA v. Gutierrez* Under Eastern District Local Rules 83-123 and 3-120. Doc. 17. The order
20 related this case to the two cases involving ESA claims regarding the population decline of the
21 Delta smelt, winter-run Chinook, spring-run Chinook, and Central Valley steelhead species. This
22 court's original Notice of Intent to Transfer Case As Related to Case 1:05-cv-01207-OWW-GSA,
23 *NRDC v. Kempthorne* and 1:06-cv-00245-OWW-GSA, *PCFFA v. Gutierrez* Under Eastern
24 District Local Rule 83-123 (Doc. 7), characterized the Plaintiff's claims:

25 "The crux of the Coalition's Complaint is that CFGC's and
26 CDFG's maintenance and enforcement of striped bass fishing
27 regulations cause the unlawful 'take' of four species of ESA 'listed'
28 fish including the Sacramento River winter-run Chinook salmon
('winter-run Chinook'), the Central Valley spring-run Chinook salmon
('spring-run Chinook'), the Central Valley steelhead ('CV steelhead'),
and the Delta smelt (collectively, 'Listed Species'). Through the

1 adoption and enforcement of the striped bass fishing regulations, which
2 include bag and size limitations, CFGC and CDFG have allegedly
3 allowed and encouraged the population of the non-native striped bass
4 to thrive in the Delta. According to the Complaint, the striped bass prey
5 upon and consume the Listed Species, and this is one of several causes
6 of the population declines of the Listed Species. The striped bass
7 regulations encourage that species' population growth, which will, in
8 turn, cause further decline of the population of the Listed Species.

9 “. . . . The Coalition's Complaint focuses on one aspect of the
10 Delta smelt's decline, which is the subject of the remedies hearing, the
11 remedial order now in place, and the overall decline of the Delta smelt
12 at issue in the *Kemphorne* case.” Doc. 7, pp. 2-3.

13
14 **B. The Applicants.**

15 The Applicants are two local Delta water agencies, a corporation operating a marine
16 business in the Delta, and two area residents. One resident, Rudy Mussi, is a farmer in the Delta,
17 and one resident, Robert Souza, Sr., is a fisherman who has fished nearly his entire life in the
18 Delta.

19 **1. Applicant Central Delta Water Agency (“Central Delta”)**

20 Central Delta is a political subdivision of the State of California, created by the California
21 Legislature in 1973. Declaration of Rudy Mussi In Support of Motion to Intervene (“Mussi
22 Dec.”) para. 18. The territorial jurisdiction of Central Delta extends to some 125,000 acres of
23 land and the associated waterways. The lands are entirely located within the boundaries of the
24 Delta as defined by section 12220 of the California Water Code, and are entirely within the
25 County of San Joaquin. The lands are principally devoted to agriculture, but there are various
26 other uses including commercial, navigation, transportation, residential, recreational, habitat, and
27 the like. *Id.*, para. 21. Some of these uses are directly related to fishing for striped bass, and
28 depend on Delta water of suitable quality. *Id.*, para. 26.

The principal, and in most cases, the only, supply of water for agricultural purposes to the
lands within Central Delta is the Delta waterways. *Id.*, para. 21. The water rights pertaining to
the lands devoted to agriculture are principally riparian in nature, but in some instances consist of
appropriative rights. *Id.*, para. 22.

Among the general purposes of the agency are to negotiate, enter into, execute, amend,

1 administer, perform, and enforce one or more agreements with the United States and with the
2 State of California, or with either, which have for their general purposes the protection of the
3 water supply of the lands within the agency against intrusion of ocean salinity and the assurance
4 of the lands within the agency, of a dependable supply of water of suitable quality sufficient to
5 meet present and future needs. Cal. Water Code Appendix, section 117-4.1, submitted in the
6 Appendix to Motion to Intervene. Central Delta is also statutorily empowered “To sue and be
7 sued . . .”, to “undertake activities to assist landowners and local districts within the agency in
8 reclamation . . . matters”, and “To do any and every lawful act necessary in order that a sufficient
9 in-channel water supply of suitable quality may be available for any present or future beneficial
10 use or uses of the lands within the agency.” *Id.*, section 117-4.3(b); and 117-4.1, respectively.
11 Central Delta also has incidental powers to carry out the purposes of its enabling legislation. *Id.*,
12 section 117-4.4.

13 Central Delta has participated in numerous proceedings involving Delta water quality and
14 supply issues. *Mussi Dec.*, para. 23. Fish, including striped bass, are dependent on the health of
15 the Delta ecosystem, including water quantity and quality. *Id.*, para. 28, *Souza Dec.*, para. 15.
16 Indeed, the Coalition’s complaint alleges the Delta smelt occupies “a narrow geographic range
17 limited to low salinity and freshwater habitats of the Delta.” *Complaint*, para. 23. Thus, the Delta
18 smelt is intensely dependent on water quality, as are the multitude of land uses in the Delta related
19 and unrelated to fishery resources directly dependent on good water quality in the Delta. The
20 Coalition has specifically raised the issue of “degradation of water quality” in the Delta.
21 *Complaint*, para. 11. The Coalition also attempts to attribute at least part of the decline in the
22 Delta ecosystem, including populations of endangered species within the Delta, to predation by
23 striped bass. *Complaint*, para. 14. The Coalition challenges the striped bass regulations,
24 activities, and policies designed to protect and enhance populations of striped bass as promoting
25 and encouraging the take of protected species. *Id.*, para. 15, 72-75, 89-92, 105-108, and 123-125.

26 If the Coalition is successful in proving its factual claims, it will adversely impact, both
27 directly and indirectly, the interests of Central Delta residents and businesses utilizing and
28 depending upon striped bass as a sport fishing resource. The Coalition is attempting to show the

1 decline in populations of endangered species as a result of sport fishing regulations and activities,
2 when the actual cause is excessive pumping. These issues necessarily implicate the several
3 interests of Central Delta in the Delta ecosystem, its water quality, and its fishery resources,
4 including striped bass.

5 **2. Applicant South Delta Water Agency (“South Delta”)**

6 Like Central Delta, South Delta is a political subdivision of the State of California, created
7 by the California Legislature in 1973. Declaration of Jerry Robinson (“Robinson Dec.”), para. 19.
8 The territorial jurisdiction of South Delta extends to some 148,000 acres of land and the
9 associated waterways, entirely located within the boundaries of the Delta as defined by section
10 12220 of the California Water Code, and entirely within the County of San Joaquin. Id. Like
11 Central Delta, the lands of South Delta are principally devoted to agriculture, but there are various
12 other uses including commercial, navigation, transportation, residential, recreational, habitat, and
13 the like. Id., para. 20. In large part, the supply of water for agricultural purposes to the lands
14 within the South Delta is from an in-channel supply. Id., para. 19. The water rights pertaining to
15 the lands devoted to agriculture principally consist of riparian and appropriative rights. Id., para.
16 19.

17 Among the general purposes of South Delta is to negotiate, enter into, execute, amend,
18 administer, perform, and enforce one or more agreements with the United States and with the
19 State of California, or with either, which have for their general purposes the protection of the
20 water supply of the lands within the agency against intrusion of ocean salinity and the assurance
21 of the lands within the agency, of a dependable supply of water of suitable quality sufficient to
22 meet present and future needs. Cal. Water Code Appendix, Section 116-4.1. South Delta is
23 similarly statutorily empowered “To sue and be sued . . .”, to “undertake activities to assist
24 landowners and local districts within the agency in reclamation . . . matters”, and “To do any and
25 every lawful act necessary in order that a sufficient in-channel water supply of suitable quality
26 may be available for any present or future beneficial use or uses of the lands within the agency.”
27 Id., Section 116-4.2(b); and 116-4.1, respectively. South Delta further has the incidental powers
28 to carry out the purposes of its enabling legislation. Id., section 116-4.3. South Delta has also

1 appeared and participated in water right and water quality proceedings before the State Water
2 Resources Control Board and the state and federal courts. Robinson Dec., para. 22.

3 A failure, however, to protect and promote populations of striped bass will adversely
4 impact, both directly and indirectly, the interests of South Delta and its residents and businesses
5 utilizing and depending upon striped bass as a sport fishing resource. Id., para. 25 and 28.
6 Further, the Coalition is attempting to show the decline in populations of endangered species as a
7 result of sport fishing regulations and activities, when the actual cause is excessive pumping. As
8 with Central Delta, these issues implicate the interests of South Delta.

9 **3. Applicant Honker Cut Marine, Inc. (“Honker Cut”)**

10 Honker Cut is a California corporation, duly organized in 1989. Since that time it has
11 owned and operated a marine business on King Island in San Joaquin County, on its namesake
12 waterway, Honker Cut. Declaration of Rodney Karnofel in Support of Motion to Intervene
13 (“Karnofel Dec.”), para. 3 and 4. Honker Cut owns the real property on which it operates along
14 the Delta waterway. Id. Honker Cut sells, services, stores, maintains, and launches boats used in
15 the Delta for pleasure, transportation, and for fishing for striped bass. Id., para. 4 and 7. Honker
16 Cut depends on a Delta water supply of suitable quality, and its business would suffer with the
17 loss of striped bass. Id., para. 15-17.

18 **4. Applicant Robert Souza, Sr.**

19 Robert Souza, Sr. is an avid fly fishing angler residing in Stockton, and frequently and
20 regularly fishes the Delta for striped bass. Declaration of Robert Souza, Sr. in Support of Motion
21 to Intervene (“Souza Dec.”), para. 1-6 and 12. Mr. Souza began fishing for striped bass in the
22 Delta in 1951, and has continued to do so. Id., para. 4-5. Mr. Souza practices “catch and release”
23 angling, and is keenly interested in the conservation of striped bass in the Delta, for both
24 recreational and aesthetic purposes. Id., para. 6. Mr. Souza is vitally interested in the protections
25 afforded striped bass by the CDFG and CFGC and would personally suffer the loss of recreational
26 and aesthetic values in the event striped bass are eradicated from the Delta. Id., para. 17.

27 **5. Applicant Rudy Mussi**

28 Rudy Mussi is a director of Central Delta Water Agency and a farmer within Central

1 Delta. Mussi Dec., para. 1. He has lived his entire life in the Delta, first on Union Island, and for
2 the last twenty-eight (28) years on Roberts Island. Id., para. 3. He depends on the San Joaquin
3 River for water used to farm his property, and with his family has used and continues to use the
4 water of the Delta for farming and for recreation purposes. Id., para. 6 and 7. Rudy Mussi has a
5 deep concern for the health and well being of the Delta, the San Joaquin River, and their environs,
6 including striped bass. Id., para. 8. The interests of Mussi in the Delta are as wide as the interests
7 of anyone within the Delta could be, and his interests are directly related to the subject matter of
8 this action. Id., passim.

9 **IV.**

10 **ARGUMENT**

11 **A. Applicants Should Be Granted Intervention As Of Right.**

12 The Ninth Circuit has adopted a four-part test for determining whether an applicant may
13 intervene as a matter of right pursuant to Rule 24(a)(2):

- 14 (1) the application for intervention must be timely;
- 15 (2) the applicant must have a significant protectable interest relating to the property or
16 transaction that is the subject of the action;
- 17 (3) the applicant must be so situated that disposition of the action may, as a practical
18 matter, impair or impede the applicant's ability to protect that interest; and
- 19 (4) representation of the applicant's interest by the existing parties
20 to the action may not be adequate.

21 *United States v. City of Los Angeles*, 288 F.3d 391, 397-398 (9th Cir. 2002), citing
22 *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

23 The Ninth Circuit construes Rule 24(a) broadly in favor of intervention. *United States v.*
24 *State of Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). The applicant is favored with regard to
25 the necessary showing on a motion to intervene: "Courts are to take all well-pleaded,
26 nonconclusory allegations in the motion to intervene, the proposed complaint or answer in
27 intervention, and declarations supporting the motion as true absent sham, frivolity or other
28 objections." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

1 **1. Applicants' Motion is Timely**

2 In assessing the element of timeliness, three factors are to be weighed: (1) the current stage
3 of the proceedings; (2) whether the other parties would be prejudiced; and (3) the reason for and
4 length of any delay in moving to intervene. *Orange County v. Air California*, 799 F.2d 535 at 537
5 (9th Cir. 1986).

6 This case remains in its very early stages. The State Defendants only answered the
7 Complaint on February 25, 2008. Doc. 14. No administrative record has been filed. On March
8 17, 2008, this action was ordered transferred and related to the existing ESA cases. Doc. 17. A
9 schedule conference is set for June 5, 2008. Doc. 18. To date, the Court has not made any
10 substantive rulings or engaged the merits of the Coalition's claims. Applicants are seeking to
11 intervene at the very early stages of these proceedings. Applicants' participation in this case will
12 contribute to a comprehensive resolution of the issues, because the Court will have the
13 opportunity to consider the applicants' interests in assuring that the various interests of the Delta
14 community to be directly affected are presented, and consider the applicants' arguments
15 concerning the application of the CVPIA to the Coalition's contentions.

16 Since there has been no delay in filing this motion, there can be no prejudice to the
17 existing parties caused by delay. The existing parties are not prejudiced "since the motion was
18 filed before the district court [has] made any substantive rulings." *Northwest Forest Resource*
19 *Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). No existing party will be prevented from
20 taking any action or otherwise hindered from pursuing their claims or defenses. Accordingly,
21 Applicants' motion to intervene is timely.

22

23 **2. Applicants Have Significant, Protectable Interests Relating to the Subject**
24 **Matter of the Coalition's Complaint**

25 In order to demonstrate a significant protectable interest, Applicants must establish that
26 their interests are protectable under some law and in some way related to the claims at issue.
27 *Northwest Forest Resource Council v. Glickman*, 82 F.3d at 837, citing *Greene v. United States*,
28 996 F.2d 973, 976 (9th Cir. 1993) and *Sierra Club v. United States E.P.A.*, 995 F.2d 1478, 1482,

1 1484 (9th Cir. 1993). This “interest test” is not a rigid standard. Rather, it is a “practical guide to
2 disposing of lawsuits by involving as many apparently concerned persons as is compatible with
3 efficiency and due process.” *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980),
4 citing *Neusse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). A proposed intervenor need not have
5 a specific “legal or equitable interest in jeopardy”, but need only show a “‘protectable’ interest in
6 the outcome of the litigation of sufficient magnitude to warrant inclusion in the action.” *Smith v.*
7 *Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981).

8 **a. The Interests of Central Delta and South Delta.**

9 The protectable interests of Central Delta and South Delta derive from their statutory
10 purposes relative to the protection of the water supply and quality in the Delta. Each agency has
11 as one of its purposes, “To protect the water supply of the lands within the agency against
12 intrusion from ocean salinity[.]” California Water Code Appendix sections 116-4.1(a)(1) and 117-
13 4.1(a)(1). Further, each agency has another purpose, “To assure the lands within the agency a
14 dependable supply of water of suitable quality sufficient to meet present and future needs.” *Id.*,
15 sections 116-4.1(a)(2) and 117-4.1(a)(2). Each agency may sue and be sued. *Id.*, sections 116-
16 4.2(b) and 117-4.3(b). Each agency has taken an active role in water quality related matters
17 before the California State Water Resources Control Board, as well as in the state and federal
18 courts. *Mussi Dec.*, para. 23; *Robinson Dec.*, para. 22.

19 The water quality interests of the agency applicants are implicated in this action, because
20 all of the fish species which are the subject matter of this action either inhabit or transit the Delta.
21 *Complaint*, para. 10, 20-23. *Mussi Dec.*, para. 16 and 28. The fish are thus dependent on a water
22 supply and water of sufficient quality to sustain them in the Delta. *Mussi Dec.*, para. 28.
23 Traditionally, striped bass have been an indicator species for the overall health of the Delta. *Id.*,
24 para. 16. Like the loss of a canary in the coal mine, the loss of an indicator in the Delta would
25 have serious adverse consequences.

26 Water quality in the Delta is further implicated by the allegation of the Coalition that the
27 Delta smelt is alleged in the *Complaint* to be “the only true native estuarine species found in the
28 Delta” and inhabits a “narrow geographic range limited to low salinity and freshwater habitats of

1 the Delta.” Complaint, para. 23. The Complaint is replete with factual assertions relating to
2 either or both water quality in the Delta and the health of the Delta ecosystem, and the interests of
3 the agency applicants. Complaint, para. 5, 6, 7, 9, 11, 13, 14, and 40-44. The Coalition alleges
4 “The health of the Delta is crucial to the water supply of the State of California . . .” Id., para. 6.
5 The Coalition further alleges “The overall health of the Delta ecosystem, including the health of
6 the populations of various species in the Delta, is in decline due to a number of factors, including
7 degradation of water quality due to urban and agricultural runoff to Delta waterways, introduction
8 of invasive and predatory species into the Delta ecosystem, water withdrawals from the Delta to
9 support the needs of growing human populations in the Delta, the Bay Area, the San Joaquin
10 Valley, and southern California, climate change, and other factors.” Id., para. 11. The Coalition
11 has thus tendered the significant, protectable interests of the agency applicants relating to water
12 supply and quality. On the face of the Complaint, the agency applicants have protectable interests
13 related to the claims and the subject matter of this action.

14 **b. The Interests of Honker Cut Marine.**

15 Honker Cut Marine operates a marine business in the Delta, selling and servicing boats. It
16 is a property owner in the Delta. Karnofel Dec., para. 4. It also operates a dry boat storage, and
17 “in-an-out’ service, launching customers’ boats for the customer’s convenience. Id., para. 7.
18 Some of Honker Cut Marine’s customers are striped bass fisherman, as is the President of Honker
19 Cut Marine. Id., para. 6 and 7. Honker Cut Marine has an interest in the health of the ecosystem,
20 including striped bass, and an interest in the outcome of this action as a result of the allegations
21 and relief sought in the Coalition’s Complaint. Id., para. 8-10, 16-19.

22 The Coalition claims “The Agencies’ sport fishing regulations operate to protect and
23 increase the non-native striped bass population in the Delta . . .” Complaint, para. 38. The
24 Coalition further claims that “As a result of implementation and enforcement of striped bass sport
25 fishing regulations and programs, as described above, the CFGC and CDFG have taken the
26 Federally-Protected species in violation of the ESA.” Id., para. 39. The Coalition’s prayer asks
27 this Court to “Enjoin defendants from enforcing striped bass regulations[.]” Id., p. 27, Prayer for
28 Relief, para. 2. The underlying premise of the Coalition’s claims is that without the regulations

1 and policies of California protecting striped bass, striped bass would decline in numbers if not
2 cease altogether.

3 Honker Cut Marine has a protected property interest, being the owner of lands along the
4 waters of the Delta, and engaged in a business servicing striped bass anglers. It has a direct
5 interest in the health of the ecosystem put in issue by the Coalition, and in maintaining, if not
6 increasing, striped bass populations in the Delta. For these reasons, Honker Cut Marine has not
7 only a protectable interest in its property, but also a protectable interest in defending the
8 regulations and policies of California protecting striped bass. These interests are directly related
9 to the claims of the Coalition.

10 **c. The Interests of Robert Souza.**

11 Robert Souza is an avid striped bass angler, and has an “educational, moral spiritual,
12 aesthetic and recreational interest in the conservation of striped bass . . .” Souza Dec., para. 6. Mr.
13 Souza has been personally fishing for striped bass since he was a child in the 1950's, and derives
14 recreational enjoyment from the presence of striped bass in the Delta. Id., para. 4 and 6. He has
15 given fishing clinics and has been active in the Delta Fly Fishers, a non-profit community-based
16 organization active in fishery resource conservation. Id., para. 12. Mr. Souza practices “catch and
17 release” angling for striped bass in the Delta, and plans to continue to fish for striped bass in the
18 Delta as long as he is able to do so. Id., para. 6 and 11. Mr. Souza has personally observed the
19 decline of all fish species in the Delta, including striped bass, and points to excessive pumping by
20 the state and federal government as the cause for the decline in all fish species, including Delta
21 smelt and striped bass. Id., para. 14-16.

22 According to Plaintiff’s Complaint, their predominant goal is to cease protections for
23 striped bass. Complaint, Prayer for Relief, para. 2. As a result thereof, striped bass populations
24 would decline or cease to exist in the Delta. Id., para. 17, Karnofel Dec., para. 19-20. The
25 interests of Mr. Souza in preserving striped bass are directly adverse to the position of the
26 Coalition. For these reasons, Mr. Souza has satisfied the requirement that he have a “protectable
27 interest” related to the Coalition’s claim.

28 //

1 **d. The Interests of Rudy Mussi.**

2 Rudy Mussi is a Delta farmer and has lived his entire life in the Delta. Mussi Dec., para. 1
3 and 3. He depends on water from the San Joaquin River to farm. Id., para. 6. Mr. Mussi and his
4 family have utilized the river for farming and recreation purposes, and he has a “deep concern for
5 the health and well being of the Delta, the San Joaquin River, and their environs. . .” Mussi Dec.,
6 para. 7-8.

7 Mr. Mussi is director of applicant Central Delta, and farms within the jurisdiction of
8 Central Delta. Id., para. 1 and 6. He is directly involved and concerned over water quality issues
9 in the Delta and the health of the Delta environs, including its fish. Id., para 7-9, 12. He has
10 devoted countless hours to Delta issues. Id., para. 11. Mr. Mussi appreciates the many uses of
11 Delta lands related to fish, including marinas, mooring and launch facilities, bait and tackle shops,
12 boat sales, service and rentals, gas stations, and other commercial enterprises, and their value to
13 the economy. Id., para. 21 and 26. Mr. Mussi is vitally interested in the health of the Delta,
14 including the health of its striped bass fishery and the Delta smelt. Id., para. 8-10.

15 The interests of Mr. Mussi are directly related to the predominant theme in this case: the
16 health of the Delta. Again, the Coalition’s Complaint alleges “The health of the Delta is crucial to
17 the water supply of the State of California” and “The overall health of the Delta ecosystem,
18 including the health of the populations of various species in the Delta, is in decline due to a
19 number of factors . . .” Complaint, para. 6 and 11. Mr. Mussi has shown a protectable interest
20 related to striped bass and the issues raised by the Coalition.

21 It is worth observing that the Coalition’s Complaint calls into question the decline in the
22 Delta ecosystem, and the causes for the decline in the Delta ecosystem. Complaint, para. 13-15,
23 38, 39. It is doubtful that in the absence of this decline and the effects of such decline the
24 Coalition would have even brought this action. Thus, the Coalition has put claims in issue not
25 merely respecting striped bass, but the health of the entire ecosystem. These claims are all related
26 to the substantial interests of each of the applicants.

27 //

28 //

1 **3. Disposition of this Action May as a Practical Matter Impair or Impede**
2 **Applicants' Ability to Protect Their Interests.**

3 The third element of Rule 24(a)(2) requires that it be shown that the disposition of the
4 lawsuit will adversely affect the applicant's interest if intervention is not granted. *Forest*
5 *Conservation Council v. U.S. Forest Service*, 66 F.3d at 1497-1498. Rule 24 "refers to
6 impairment 'as a practical matter.' Thus, the court is not limited to consequences of a strictly
7 legal nature." *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d at 1498, quoting
8 *Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission*, 578 F.2d 1341,
9 1345 (10th Cir. 1978). Impairment may come in the form of factual and legal determinations that,
10 when upheld by an appellate ruling, "will have a persuasive *stare decisis* effect in any parallel or
11 subsequent litigation." *United States v. Oregon* 839 F.2d 635, 638 (9th Cir. 1988).

12 The Applicants have each satisfied this requirement. The Coalition filed the Complaint
13 for the express purpose of enjoining California's striped bass policies and regulations. Should the
14 Coalition succeed, the Applicants interests in the preservation of striped bass in the Delta would
15 suffer, and be substantially affected in a practical sense.

16 Central Delta and South Delta are public agencies with a direct interest in the protection of
17 the water supply and quality in the Delta, and thereby the viability of the Delta's striped bass. As
18 an indicator species, and with other species in decline such as Delta smelt, the Coalition's
19 intended result of eradicating striped bass would impair the agencies in their ability to evaluate
20 and protect Delta water quality. Also, some of the lands are devoted to uses directly related to the
21 fishery, including marinas, boat sales and repair, bait shops, and restaurants. These interests
22 would certainly be impaired.

23 Further, the Coalition apparently seeks to establish that striped bass and various stressors
24 are to blame for decline in the Delta ecosystem quality and various species in the Delta.
25 Complaint, para. 11. Central Delta and South Delta have direct interests at stake in any
26 determination as to the causes of the decline in the Delta ecosystem, which includes its water
27 quality. Any such determinative would have a "persuasive *stare decisis* effect in any parallel or
28 subsequent litigation." *U.S. v. Oregon*, 839 F.2d 638. For good reason, Central Delta and South

1 Delta are interested in any determination regarding the decline of the Delta to prevent being barred
2 in a subsequent action.

3 For Souza, Mussi, and Honker Cut, the impairment of their interests is more obvious.
4 Souza will suffer aesthetically and lose the use of a source of personal solace and pleasure, as well
5 as recreational activities, if striped bass protections are eliminated and striped bass are eradicated
6 from the Delta. Indeed, Souza stands to lose the ability to fish for striped bass in the Delta. Souza
7 and Mussi will both suffer the impairment of their interests in the protection and conservation of
8 the Delta ecosystem, and the fish and wildlife that inhabit the Delta. Similarly, Honker Cut has
9 interests and would suffer the loss of business and be substantially affected if the Coalition
10 succeeds, and striped bass are eradicated from the Delta. Striped bass are a substantial asset of the
11 Delta and the people that live, work, and recreate in the Delta. Their interests in striped bass are
12 in issue and would be impaired if the Coalition succeeds.

13

14 **4. The Applicants' Interests Are Not Adequately Represented by the Existing**
15 **Parties.**

16 The final element necessary for intervention as of right is inadequate representation by the
17 existing parties. Applicants satisfy this element by establishing that their interests may not be
18 adequately protected by the existing parties to the action. However, in this regard Applicants have
19 a "minimal" burden in showing inadequate representation: "it is sufficient to show that
20 representation *may* be inadequate." *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d
21 at 1498, (original emphasis); citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10
22 (1972); *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986).

23 In determining the adequacy of representation, consideration should be given to "whether
24 the interest of a present party is such that it will undoubtedly make all the intervenor's arguments;
25 whether the present party is capable and willing to make such arguments; and whether the
26 intervenor would offer any necessary elements to the proceedings that other parties would
27 neglect." *Forest Conservation Council*, 66 F.3d at 1498-1499, citing *California v. Tahoe*
28 *Regional Planning Agency*, 792 F.2d at 778. Again, these factors should be examined in light of

1 Applicants' minimal burden. Intervention of right should be allowed where, as here, the interests
2 of the Applicants actually, or even potentially, differ from those of the existing parties. First of
3 all, we have the benefit of the state of California's Answer of State Defendants John Carlson, Jr.,
4 et al., and there is no mention of the CVPIA. Doc. 11. However, Applicants proposed answer
5 squarely raises the provisions of the CVPIA pertaining to anadromous fish and striped bass.
6 Proposed Answer of Defendants In Intervention, page 13, Affirmative Defenses, para. 1. Thus,
7 the state of California has not raised one of the arguments of Applicants supporting the CDFG and
8 CFGC.

9 Turning to the elements the Applicants would offer, who better to represent the Delta, than
10 the Applicants? They represent the interests of the individuals living, working, and recreating in
11 the Delta, and two local governmental agencies charged with Delta protection. Their concerns are
12 the protection of striped bass and the general health of the Delta ecosystem. The State defendants
13 cannot be reasonably expected to adequately represent the concerns of the Applicants. See Souza
14 Dec., para. 18, Mussi Dec., para. 30, Karnofel Dec., para. 20, and Robinson Dec., para. 29. This
15 is particularly so since the state is one of the two major exporters of water. The state is required
16 to comply with other applicable legal obligations that may affect state water project operations,
17 and these obligations are not necessarily consistent with the protection of striped bass. Because
18 the state must represent the broad public interests of the state as a whole, the localized interests of
19 the Applicants should be allowed to protect their interests. In *Southwest Center for Biological*
20 *Diversity v. Berg*, 268 F.3d at 823, the Ninth Circuit observed a federal agency defendant, the U.S.
21 Fish & Wildlife Service in that case, "cannot be expected under the circumstances presented to
22 protect these private interests [of the proposed intervenors]"). See also *Georgia v. United States*
23 *Army Corps of Engineers*, 302 F.3d 1242, 1259 (11th Cir. 2002): " We do not believe a federal
24 defendant with a primary interest in the management of a resource has interests identical to those
25 of an entity with economic interests in the use of that resource"; *Sierra Club v. Espy*, 18 F.3d
26 1202, 1208 (5th Cir. 1994), where the timber industry was granted intervention as defendant in a
27 case brought against federal agencies by environmental interests, stating "The government must
28 represent the broad public interest, not just the economic concerns of the timber industry."

1 It would seem beyond reasonable dispute that the Applicants' interests will not be
2 represented by the Coalition. This is particularly so given that the Coalition is requesting
3 injunctive relief that would remove any protections for striped bass that the Applicants are seeking
4 to maintain. The Coalition apparently does this in the hope of eradicating striped bass from the
5 Delta. None of the members of the Coalition are located within the Delta, and other than Dee
6 Dillon their only stake in the Delta is in exporting water. They appear to blame alleged stressors
7 other than water exports. In any event, all of the Coalition members, including Dee Dillon, have
8 at least a short-term objective that differs from the Applicants.

9 Finally, apart from the questions of adequacy of representation, intervention should be
10 granted so that the Court may be fully advised of the merits of the controversy and the interests
11 that will be affected by the Court's decision. The Applicants are in a much better position than
12 any of the existing parties to inform the Court of the practical, local impact of a decision in favor
13 of the Coalition in this case, and the potential implications of any injunctive relief directed toward
14 striped bass. The Applicants are best equipped and able to make this presentation to the Court,
15 and bring their unique ability to provide evidence of local conditions.

16 For all of these reasons, it is respectfully submitted the Applicants have met each of the
17 requirements for intervention as of right, and therefore, request the Court grant intervention
18 pursuant to Rule 24(a).

19

20 **B. Alternatively The Court Should Allow Permissive Intervention Pursuant to Rule**
21 **24(b)(2).**

21

22 As an alternative to intervention as of right, it is respectfully submitted the Court should
23 permit the Applicants to intervene pursuant to Rule 24(b)(2). The requirements for permissive
24 intervention under Rule 24(b) applicable to this case are:

25

(1) A timely application;

26

(2) A claim or defense sharing common questions of law or fact with the main action;

27

(3) A lack of undue delay or prejudice to the parties if intervention is allowed.

28

Permissive intervention does not require a direct interest in the subject matter of the

1 action. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 at 1108 and 1111 (9th Cir. 2002). It
2 is appropriate to consider whether Applicants' participation "will significantly contribute . . . to
3 the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City*
4 *Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

5 Applicants have shown this motion is timely in section IV(A)(1) above, and intervention
6 will not unduly delay or prejudice the adjudication of the rights of any of the existing parties. As
7 for the second element, regarding whether the applicants' proposed pleading raises questions of
8 law or fact in common with the main action, this should be liberally construed in the Applicants'
9 favor. *Silver v. Babbitt*, 166 F.R.D. 418, 433 (D.Az. 1994). Even under strict construction,
10 however, the Applicants satisfy this element.

11 At a minimum, there are common questions of fact as to the role of striped bass in the
12 decline of Delta smelt, and the causes of the general decline in the Delta ecosystem. There are
13 also common questions of law, in that the applicants share the defenses raised by the state.
14 Moreover, there is a common question of law as to the application of the ESA to this case, and the
15 Applicants' claim as to the effect of the requirements of the CVPIA. Applicants raise the CVPIA
16 provisions concerning anadromous fish, defined to include striped bass, as set forth in section
17 3403(a) and 3406 (b)(1), (14), and (18). The application of the CVPIA to the actions of CDFG
18 and CFGC presents a common question of law.

19 The Applicants do not here seek to intervene in order to raise any collateral issues to the
20 claims already raised in the Complaint and the state's Answer. Instead, they will join with the
21 state of California in defending the action of CDFG and CFGC.

22 In *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d at 1108, the Ninth Circuit found that an
23 "interest in the use and enjoyment" of roadless areas was sufficient to support permissive
24 intervention in a case that challenged rules protecting those areas from harmful development. *Id.*
25 at 1108. Here, Applicants Souza, Mussi, and Honker Cut, each have shown a substantial interest
26 in the use, enjoyment, and protection of striped bass, and in the health of the Delta. Central Delta
27 and the South Delta have shown their governmental interests in the issues raised by Plaintiffs. In
28 addition, Applicants are uniquely situated and have substantial experience with the Delta and

1 striped bass, and could contribute to the resolution of this case. Given the importance of the
2 issues involved in this case, the stake Applicants have in striped bass, and the early stage of this
3 litigation, it is respectfully submitted this Court should allow permissive intervention.

4 V.

5 **CONCLUSION**

6 The Applicants are so situated that their unique interests will be affected by the outcome
7 of this action. Those interests are not represented by any party, and will be impaired by the
8 outcome desired by the Coalition. It is respectfully submitted that each of the Applicants has
9 satisfied the requirements for intervention as of right. As an alternative, however, Applicants
10 respectfully request that this Court exercise its discretion to allow their permissive intervention.

11 Dated: April 15, 2008

Respectfully submitted,

12 NOMELLINI, GRILLI & McDANIEL
13 PROFESSIONAL LAW CORPORATIONS

14
15 By: /s/ Daniel A. McDaniel
16 DANIEL A. McDANIEL
17 Attorneys for Applicants for Intervention
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