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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
10 **SACRAMENTO DIVISION**

11 COALITION FOR A SUSTAINABLE DELTA,) **Case No. 1:08-CV-00397-OWW-GSA**
12 BELRIDGE WATER STORAGE DISTRICT,)
13 BERRENDA MESA WATER DISTRICT, LOST)
14 HILLS WATER DISTRICT, WHEELER RIDGE) **MEMORANDUM OF POINTS AND**
15 MARICOPA WATER STORAGE DISTRICT,) **AUTHORITIES IN SUPPORT OF MOTION**
16 AND DEE DILLON,) **TO INTERVENE**
17 Plaintiffs,)

18 vs.)
19 JOHN CARLSON, JR., in his official capacity as) Date: July 14, 2008

20 Executive Director of the California Fish and) Time: 10:00 a.m.
21 Game Commission, RICHARD ROGERS, in his)

22 official capacity as President of the California) Judge: The Honorable Oliver W. Wanger
23 Fish and Game Commission, CINDY)

24 GUSTAFSON, in her official capacity as Vice)
25 President of the California Fish and Game)

26 Commission, JIM KELLOGG, in his official)
27 capacity as Member of the California Fish and)

28 Game Commission, MICHAEL SUTTON, in his)
29 official capacity as Member of the California Fish)

30 and Game Commission, CALIFORNIA FISH)
31 AND GAME COMMISSION, JOHN)

32 MCCAMMAN, in his)
33 official capacity as Interim Director of the)

34 California DFG, AND CALIFORNIA)
35 DEPARTMENT OF FISH AND GAME,)

36 Defendants)
37)

38 California Sportfishing Protection Alliance,)
39 California Striped Bass Association, Northern)

40 California Council of the Federation of)
41 Flyfishers,)

42 Proposed Intervenors/Defendants)

1 **INTRODUCTION AND SUMMARY**

2 When the first water quality plan was created for the Bay-Delta Estuary in 1978, the
3 striped bass fishery had existed in the estuary for 125 years. For the first 100 years after their
4 introduction into the San Francisco Bay/Delta estuary, the striped bass, the Delta smelt and the
5 Central Valley salmon coexisted and thrived. Management of the three species realized the
6 mission of the Department of Fish and Game (hereinafter "DFG") to manage California's diverse
7 fish, wildlife, and plant resources, and the habitats upon which they depend, for their ecological
8 values and for their use and enjoyment by the public.

9 In the summer of 1959 DFG began monitoring the abundance of fish and zooplankton
10 invertebrates in Suisun Bay and the Delta. From the survey data DFG developed an index of
11 abundance of young striped bass, which is the most important sport fish in the Bay-Delta to this
12 day. Though the index and the supporting surveys were relatively crude and simple compared
13 with the technology available today, they proved to be an effective measure for the ecological
14 health of the estuary. Much like the proverbial canary in the coal mine the striped bass indicate
15 the health and vitality of the Delta. We believe that this lawsuit is designed to eliminate the
16 canary before anyone sees it die and realizes that the export pumps are the primary cause of
17 death in the estuary.

18 DFG's top experts on the Bay-Delta estuary, Turner and Chadwick (1972), wrote a four-
19 page paper, published in the Journal of the American Fisheries Society, that turned out to be a
20 classic in estuary science. In their paper, the authors were able to directly relate the summer
21 abundance of young striped bass to the increased water flowers in late spring and early summer
22 through the estuary. They found that populations of striped bass in major coastal estuaries
23 where adult fish grew to over 50 lbs and 15 years or older were directly dependent on the
24 survival of the ¼ inch larvae living in a small portion of river estuaries for a short period of the
25 late spring and early summer. Many of the surveys conducted by DFG in the Bay-Delta became
26 the norm on east coast estuaries including the Hudson River

27 It did not take long after the approval of the State Water Project, and the beginning of
28 water deliveries to Plaintiffs herein, for the striped bass fishery decline to begin. A serious

1 decline in the striped bass population became apparent by the end of the 1970's soon after the
2 Banks Pumping Plant of the State Water Project came on line in 1968. The Bay-Delta striped
3 bass population was in period of sharp decline that appeared to begin in 1977. It is believed by
4 many scientists that the naturally produced striped bass, Delta smelt, and salmonids of the
5 Central Valley tributaries to the Delta have declined as a consequence of spring and summer
6 water exports from the south Delta by State Water Project and Central Valley Project pumping
7 plants. Evidence presented over the past 30 plus years by the California DFG and other federal
8 and state resource agencies indicates that historical water quality standards (D-1485 and D-1641)
9 for the Bay-Delta have not provided adequate protection for Delta fish populations. The
10 California Bay Delta Authority (formerly CALFED) and the Central Valley Project
11 Improvement Act (hereinafter "CVPIA") programs also have not provided sufficient protection
12 for these fish populations. Biological opinions for pumping plant operations for the Delta smelt
13 and salmon also have not afforded adequate protection and, in the case of the Delta smelt, have
14 recently been found to be legally insufficient.

15 These species are in collapse (Delta smelt) and the Central valley fall run salmon
16 situation is so dire that the Pacific Management Council has stated that their populations are in
17 "unprecedented collapse." The similarly declining long-fin smelt has recently been listed by the
18 California Fish & Game Commission as a candidate species for protection under the California
19 Endangered Species Act. Emergency export curtailments have been ordered for June, July, and
20 November of 2008. Export losses of striped bass, Delta smelt, and Central Valley salmon have
21 severely depressed annual young production and recruitment into their adult populations, which
22 has further damaged the already low adult population and further lowers subsequent young
23 species production.

24 Annual exports have increased from 2 million acre-ft of water in the 1960's, to 4 million
25 acre-ft in the 1970's, and to 6 million acre-ft in the 1980's. In 2001 and 2003 annual exports
26 reached record annual levels of 6.3 million acre-ft, or roughly half of the Delta's fresh water
27 inflow. In 2003, June to July exports reached a record 1.3 million acre-ft. Standard summer
28 exports from the south Delta are now 10,000 cubic feet per second (cfs) – the full capacity of the

1 federal and state pumping plants. High spring to summer water exports create reverse flows in
2 the lower San Joaquin River, causing the river to literally run backwards. The Striped Bass
3 Working Group, hired by the State Water Resources Control Board in 1982 to study the striped
4 bass decline, found that the flow reversal produced by export pumping caused over 50 % of
5 larval and juvenile striped bass to be exported from the Delta and/or killed. These losses directly
6 affect recruitment of 3 yr-olds into the adult population and thus reduce subsequent adult
7 spawning populations. Reductions in the spawning population directly translate into fewer young
8 produced. Export losses continue to compound almost exactly as predicted by the Striped Bass
9 Working Group over 25 years ago.

10 New water quality standards were adopted in 1978 to protect striped bass and other
11 beneficial uses. The striped bass criteria in that plan were primarily minimum monthly-averages
12 for Delta outflow and average monthly export limitations in spring and early summer. In
13 addition there were standards for April Delta salinity and outflow to protect striped bass
14 spawning. With a continuing decline of the striped bass adult population and young production
15 indices, and the obvious lack of protection provided by the D-1485 standards, the SWRCB
16 opened hearings on the Bay-Delta standards again in 1986. Considerable testimony was
17 prepared and taken by the Board over the one-year period that provided further insights into
18 water exports effect on the estuary and the striped bass indicator species. Additional hearings
19 confirming these facts before the Board accompanied the 1995 Bay/Delta Water Quality Plan
20 and Board Decision 1641 implementing the 1995 Plan. Again, water exports and pump induced
21 hydrodynamic changes in flows were identified as a major stressor on the striped bass, the Delta
22 smelt, and the Central Valley salmon.

23 Numerous scientific studies over 30 years have found that, due to the extreme damage
24 caused by reverse flows in the lower San Joaquin River, pumping that causes reverse flows
25 should not be allowed in spring and early summer. New state-of-the-art fish screens and
26 improved salvage systems should be implemented at the south Delta pumping plants to reduce
27 the loss of fish to entrainment and to associated losses due to salvage and handling. Fish
28 restoration funds should be more focused toward improving survival of Delta fishes. Finally,

1 project operations and protection facilities once directed toward protecting striped bass (which
2 over the past decade have been redirected toward other fish and increased water export) should
3 be redirected back to the estuary to provide guaranteed protections for striped bass in accordance
4 with the Central Valley Project Improvement Act (CVPIA) and state laws. Protection of striped
5 bass also benefits Delta smelt and San Joaquin salmon populations, and is vital in improving
6 their healthy recovery.

7 From the beginning of March through mid April 2003, the period when larval Delta smelt
8 were highly vulnerable to export, Delta smelt are theoretically protected by the 35%
9 export/inflow criteria of the 1995 Standards. In reality, the export/inflow ration average was
10 40%, not 35%, and reached a maximum daily rate of 54%. Exports in March alone averaged
11 **11,000 cfs** and was only slightly less in early April. Except for the storm period in the third
12 week of March, about half the inflow of fresh water entering the Delta was being exported
13 during the period, in direct violation of the 1995 standard. Data recovered through the 20-mm
14 survey catch and length-frequency recording of larval smelt show that during the late spring and
15 early summer, larval smelt concentrated in the San Joaquin portion of the Delta are highly
16 susceptible to being drawn into the export pumps and killed. Larval stage striped bass have fared
17 equally poorly. High exports continued in 2004, 2005, 2006, and 2007. While exports will be
18 lower in 2008, the reason is not due to realization by the Plaintiffs of the damage their actions are
19 causing. The smaller exports in 2008 are the result of a hard-fought legal victory in N.R.D.C v.
20 Kemphorne, in which Judge Oliver Wanger correctly found the export pumps to be a cause of
21 the smelt decline and issued an interim order reducing pumping for 2008.

22 CSPA contacted the lawyer for the Coalition and told him of our desire to intervene as
23 required by the federal rules. He told us that his clients would take no position on the
24 intervention request until he saw our moving papers. We contacted the defendant's attorney and
25 he indicated that he would contact his clients and get back to us about their position. It has been
26 approximately one week and we have not yet heard whether they agree to our intervention.

1 **STATEMENT OF INTEREST**

2 The CSPA and its members and its affiliate sport fishing organizations (California
3 Striped Bass Association and the Northern California Council of the Federation of Fly Fishers),
4 and members of its allied groups, including the thousands of members of all of these
5 organizations, regularly use and enjoy the Bay/Delta's rivers, streams, wildlife, and other natural
6 areas for a variety of recreational, aesthetic, educational, and scientific purposes, including, but
7 not limited to, hiking, fishing, swimming, boating, wildlife observation, scientific research,
8 photography, nature study, and aesthetic appreciation. Individual members of the CSPA can be
9 found in the Bay/Delta year-round, watching birds, boating the rivers and sloughs, fishing the
10 waters, guiding scientific groups, working, hunting, and recreating with their families and friends
11 in this outstanding recreational setting. CSPA members frequently visit and/or travel through the
12 Bay/Delta. Some members of the CSPA have businesses and livelihoods in the agriculture and
13 recreational fishing and boating industries, which are directly affected by Bay/Delta water
14 management programs and this lawsuit.

15 CSPA and its members and members of affiliate groups intend to do all of the foregoing
16 on an ongoing basis in the future and thereby do and will continue to derive recreational,
17 aesthetic, scientific, educational, conservational, and economic benefit from the native habitats
18 of the Bay/Delta. Members representing the CSPA have attended dozens of State Water Board
19 hearings on Delta water quality and fisheries issues, Congressional meetings and hearings
20 concerning Delta water quality and fisheries management, the CALFED program science and
21 management meetings, and has been a party in many administrative hearings held in regard to
22 the striped bass in the estuary. Several CSPA members have provided extensive testimony and
23 evidence to Congress, the California state legislature, and the State Board because of their
24 extensive knowledge about the Bay/Delta, which is a unique and irreplaceable resource for
25 California, the United States, and the world. Members commit their many hours and efforts to
26 the CSPA out of a sense of citizenship, environmental stewardship, and loyalty to the Bay/Delta
27 resource. Members of CSPA regularly exercise their rights to fish under the California
28 Constitution, Section 25.

1 **I. INTERVENORS SATISFY THE REQUIREMENTS FOR INTERVENTION AS A**
2 **MATTER OF RIGHT**

3 Federal Rule of Civil Procedure 24(a)(2) provides:

4 Upon timely application anyone shall be permitted to intervene in an
5 action...(2) when the applicant claims an interest relating to the property
6 or transaction which is the subject of the action and the applicant is so
7 situated that the disposition of the action may as a practical matter impair
or impede the applicant's ability to protect that interest, unless the
applicant's interest is adequately represented by existing parties.

8 The Ninth Circuit uses a four-prong test in applying Rule 24:

9 (1) the application for intervention must be timely; (2) the applicant must
10 have a 'significantly protectable' interest relating to the property or
11 transaction that is the subject of the action; (3) the applicant must be so
12 situated that the disposition of the action may, as a practical matter, impair
or impede the applicant's ability to protect that interest; and (4) the
13 applicant's interest must not be adequately represented by the existing
parties in the lawsuit.

14 Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 817-818 (9th Cir. 2001). In
15 United States v. City of Los Angeles, 288 F.3d 391, 397-398 (9th Cir. 2002) the Ninth Circuit
provided the following guidance for applying the four-prong test:

16 In evaluating whether these requirements are met, courts 'are guided
17 primarily by practical and equitable considerations.' Further, courts
18 generally 'construe [the Rule] broadly in favor of proposed intervenors.' A
19 liberal policy in favor of intervention serves both efficient resolution of
20 issues and broadened access to the courts. By allowing parties with a
21 practical interest in the outcome of a particular case to intervene, we often
prevent or simplify future litigation involving related issues; at the same
time, we allow an additional interested party to express its views before
the court.'

22
23 Courts also should "take all well-pleaded, non-conclusory allegations in the motion to
24 intervene, the proposed complaint or answer in intervention, and declarations supporting the
25 motion as true absent sham, frivolity or other objections." Southwestern Center for Biological
26 Diversity, *supra*, 268 F.3d at 820. All of the requirements for intervention as a matter of right
27 under Rule 24(a)(2) are satisfied here.

28 **A. Intervenor's Motion to Intervene is Timely**

1 The three factors used to determine timeliness are “(1) the stage of the proceeding at
2 which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the
3 length of the delay.” United States v. Carpenter, 298 F.3d 1122, 1125 (9th Cir. 2002) (quoting
4 County of Orange v. Air Calif., 799 F.2d 535, 537 (9th Cir. 1986), *cert denied*, 480 U.S. 946
5 (1987).

6 Due to the nature of the Plaintiffs’ assertions and prayer for relief, no accommodation
7 short of filing this motion would be possible for Intervenors to maintain the protection of their
8 interests. The CSPA, since 1983, has represented the interests of fisheries organizations and
9 individual angler members in administrative and legal action in Central Valley rivers and the
10 Bay/Delta relating to the striped bass and other fisheries. The California Striped Bass
11 Association has as its main purpose the conservation and management of the striped bass in the
12 estuary. Plaintiffs cannot complain of prejudice. The Plaintiffs are clearly trying to eliminate the
13 striped bass from the estuary and with it the recreational, environmental, and economic interests
14 that the striped bass fishery support. They are asking this court to find that the program to
15 maintain the survival of these fish is unlawful. The CSPA members and the anglers they
16 represent are certainly “other interested parties” even though they were not directly named by the
17 Plaintiffs when they challenged the DFG striped bass management program and the California
18 Fish and Game Commission’s authority to regulate sport fishing in this action.

19 **B. Intervenors Have Significantly Protectable Interests At Stake**

20 An Intervenor has a “significantly protectable interest” at stake if “(1) it asserts an
21 interest that is protected under some law, and (2) there is a ‘relationship’ between its legally
22 protected interest and the [already existing] claims.” United States v. City of Los Angeles, *supra*,
23 288 F.3d at 398 (quoting Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998). “The
24 ‘interest’ test is not a clear-cut or bright line rule, because ‘no specific legal or equitable interest
25 need be established.” *Id.* (quoting Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993)
26 (Reinhardt, J., dissenting). Instead, the “interest” test is primarily “a practical guide to disposing
27 of lawsuits by involving as many apparently concerned persons as is compatible with efficiency
28

1 and due process.” *Id.* (quoting County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980)
2 (internal quotation marks and citation omitted).

3 If the Plaintiffs prevail in this lawsuit and the striped bass fishery is eliminated from the
4 Bay/Delta estuary, the anglers represented by the CSPA will lose the recreational sport fishery
5 that the DFG has provided for California citizens; the local Bay/Delta economy will lose the jobs
6 and the commercial value from the fishery; the people of the United States will lose the fishery
7 whose protection the CVPIA was intended to reserve, and the Bay/Delta estuary will suffer
8 under the loss of further habitat that is vital to hundreds of native species. The DFG program at
9 issue herein was carefully planned pursuant to all environmental laws, including the Endangered
10 Species Acts, and the dictates of the CVPIA and will not only help protect the Bay/Delta estuary
11 from loss of its long time indicator species, but will preserve the substantial economic value the
12 striped bass fishery generates to the Bay/Delta communities – economic interests not unlike
13 those represented by Plaintiffs herein. Therefore, Intervenors’ rights under the Act are clearly
14 “significantly protectable interests” for purposes of intervention.

15 **C. Disposition of this Action without Intervenors Would Impair or Impede**
16 **Intervenors’ Ability to Protect Its Interests.**

17 Intervenors’ interests would be substantially impaired if this suit proceeds without them.
18 If the Plaintiffs prevail in the litigation, the DFG would be enjoined from proceeding with its
19 program to arrest the decline of the Striped Bass in the Bay/Delta estuary. The Plaintiffs are
20 asking this court to require the DFG to prove the efficacy of a program that is operating as a last
21 ditch attempt to maintain an important fishery in the face of over-pumping of export water from
22 the Bay/Delta.

23 The striped bass management program has been recommended and approved by state and
24 federal fishery agency scientists and granted permits under the Federal ESA as a program for
25 balancing striped bass management with other lawful uses in both the Bay/Delta and its
26 watershed rivers as a public resource. Even though Intervenors could bring suits to protect other
27 beneficial uses of the Bay/Delta estuary affected by project over-appropriation of water, the *stare*
28 *decisis* effect of a prior decision regarding the DFGs striped bass management program and the
sport fishing status and regulations promulgated by the California Fish and Game Commission

1 without Intervenor would be prejudicial to their interests. See Sierra Club v. U.S.
2 Environmental Protection Agency, *supra*, 995 F.2d at 1486 (“Although the [Intervenor] might
3 challenge various determinations in separate proceedings, those proceedings would be
4 constrained by the *stare decisis* effect of the lawsuit from which it had been excluded.”

5 Amicus status is not an adequate substitute that would protect Intervenor’s interests in
6 this case. As the Ninth Circuit pointed out in United States v. City of Los Angeles, *supra*, 288
7 F.3d at 400: “amicus status is insufficient to protect the [Intervenor’s] rights because such status
8 does not allow the [Intervenor] to raise issues or arguments formally and gives it no right of
9 appeal.”

10 **D. Intervenor’s Interests Are Not Adequately Represented By the Existing Parties.**

11 Intervenor’s burden of showing that their interests are not adequately represented is
12 “minimal,” and is satisfied merely by showing that representation by existing parties “may be”
13 inadequate. Trbovich v. United Mine Workers, 404 U.S. 528, 538 N. 10 (1972); Southwest
14 Center for Biological Diversity, *supra*, 268 F.3d at 823. In evaluating adequacy of representation
15 a court should look to:

- 16 (1) whether the interest of a present party is such that it will undoubtedly
17 make all the Intervenor’s arguments; (2) whether the present party is
18 capable and willing to make such arguments; and (3) whether the would-
be Intervenor would offer any necessary elements to the proceedings that
other parties would neglect.

19 *Id.* at 822.

20 A review of the Kern complaint makes it immediately clear why the Plaintiffs could not
21 possibly represent Intervenor’s interests. Our view is that the Kern parties are attempting to
22 deprive the Bay/Delta estuary of both additional water resources and the striped bass fishery.
23 We believe, based on our reading of their complaint, that the Kern parties are willing to destroy
24 the striped bass fishery in the Bay/Delta and do billions of dollars of damage to the recreational
25 economy of Northern California for their own private economic gain. The Plaintiffs and the
26 proposed Intervenor have directly inconsistent views.

27 The DFG cannot adequately represent the interests of Intervenor in this litigation. First
28 and foremost, Intervenor is in a somewhat adversarial position with the DFG over their neglect

1 of fisheries in the Bay/Delta. We believe that the DFG has failed to protect the aquatic
2 environment of California as required by law. In regard to Delta smelt, Central Valley salmon,
3 Steelhead, and striped bass, proposed Intervenor believe that DFG has yielded to political
4 pressure from the Kern parties and others. Both Plaintiffs and Intervenor have litigated against
5 the DFG for these perceived failures, but for different and opposing reasons. The DFG is
6 presently appealing a decision of the Alameda County Superior Court that found that the
7 Department has failed to follow state endangered species law regarding the Delta smelt.
8 Intervenor plan to sue on endangered species grounds if the Department fails to give our
9 requested relief in that case.

10 Finally, Intervenor will offer a necessary perspective on the issues that other parties will
11 undoubtedly neglect. Intervenor and the California anglers represented by them will bear the
12 brunt of the decision. In Turn Key Gaming v. Oglala Sioux Tribe, 164 F.3d 1080 (8th Cir. 1999),
13 the Eighth Circuit found that even when the Intervenor had some level of common interests, the
14 inquiry was whether the level of protection by the already existing party would be adequate. It
15 found, for example, that even a difference in litigation strategy was reason for finding
16 intervention appropriate.

17 In sum, all of the requirements for intervention as a matter of right have been satisfied,
18 and Intervenor should be permitted to intervene under Fed. R. Civ. P. 24. If Intervenor are not
19 allowed to intervene, their 25 years of work in the CSPA in regard to the striped bass fishery
20 could be wiped out, the Bay/Delta could decline, our recreational fishery will be depleted, and
21 the local fishing economy would go into a depression. Beyond that, this court could be gravely
22 misled about the real condition of the Bay/Delta and the species that are dependent upon it.

23 **II. In The Alternative, CSPA Should Be Permitted To Intervene Pursuant to F.R.C.P.**
24 **24(b).**

25 If the Court determines that CSPA is not entitled to intervene as a matter of right, the
26 Court should nonetheless exercise its discretion to allow CSPA to intervene under Fed. R. Civ. P.
27 Rule 24(b). That rule provides in relevant part:

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

1 question of law or fact in common. . . . In exercising its discretion the
2 court shall consider whether the intervention will unduly delay or
3 prejudice the adjudication of the rights of the original parties.

4 Courts in the Ninth Circuit have recognized that permissive intervention may be granted
5 in the court's discretion if: (1) the motion is timely; (2) CSPA's claim or defense has a question
6 of law or fact in common with the existing action; and (3) intervention will not delay or
7 prejudice the adjudication of the rights of the original parties. Bossier Parish School Bd. v.
8 Reno, 157 F.R.D. 133 (D.D.C. 1994). This is a substantially lower burden than the test for
9 intervention of right under Rule 24(a), but like intervention of right, permissive intervention is to
10 be granted liberally. See 7C Charles Alan Wright & Arthur R. Miller, Federal Practice And
11 Procedure § 1904 (1986).

12 CSPA meets all the prerequisites for permissive intervention. First, CSPA's motion is
13 timely. See Part 1-A, *supra*. Second, because CSPA will present procedural and substantive
14 arguments in defense of the Striped Bass Management Plan, its defenses will share substantial
15 questions of law and fact with the main action. Third, as discussed above, intervention will not
16 delay or prejudice the existing parties. Thus, even if this Court denies CSPA's intervention as a
17 matter of right, it should grant their request for permissive intervention.

18 CONCLUSION

19 For all the foregoing reasons, Intervenors' motion for leave to intervene should be
20 granted.

21 Dated: May 19, 2008

22 _____
23 /s/ MICHAEL B. JACKSON

24 MICHAEL B. JACKSON
25 Attorney for Proposed
26 Intervenor/Defendant
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