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15 **UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

17 PACIFIC COAST FEDERATION OF
18 FISHERMEN'S ASSOCIATIONS, *et al.*,
19 Plaintiffs,

20 v.

21 WILBUR ROSS, in his official capacity as
22 Secretary of Commerce, *et al.*,
23 Defendants,

24 and

25 SAN LUIS & DELTA-MENDOTA WATER
26 AUTHORITY, *et al.*,
27 Intervenor-Defendants.

Case No. 3:19-cv-07897-LB

**NOTICE OF MOTION, MOTION
TO INTERVENE, AND
MEMORANDUM OF POINTS
AND AUTHORITIES OF THE
STATE WATER CONTRACTORS**

Date: April 7, 2020

Time: 9:30 a.m.

Crtrm: B

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TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on April 7, 2020 at 9:30 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Laurel Beeler, located in the United States District Court for the Northern District of California San Francisco Division, the State Water Contractors (“SWC”), including its member agencies—which include among others the Metropolitan Water District of Southern California, Kern County Water Agency, Central Coast Water Agency, and Solano County Water Agency—will and hereby does move for leave to intervene as defendant in the above-entitled action.

By this Motion, the SWC respectfully requests leave to intervene as a matter of right as defendant pursuant to Federal Rule of Civil Procedure (“FRCP”) 24(a)(2), or alternatively, as a matter of permission pursuant to FRCP 24(b). A proposed answer accompanies this Motion. This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Jennifer Pierre, the Declaration of Jenna Mandell-Rice, a proposed answer in intervention, a proposed order, all of the pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to its ruling. This Motion is filed concurrently with a Motion to Shorten Time on the briefing of this Motion.

The SWC conferred with the Parties. Defendants and the existing Defendant-Intervenors do not oppose this Motion. Mandell-Rice Decl. ¶¶ 5, 7. Plaintiffs do not take a position on this Motion. *Id.* ¶ 3.

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26
27

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GLOSSARY..... v

INTRODUCTION 1

STATEMENT OF ISSUES TO BE DECIDED 3

STATEMENT OF FACTS 3

 A. The SWP and CVP..... 3

 B. Endangered Species Act Consultation 5

 C. National Environmental Policy Act Analysis 6

 D. The Current Dispute..... 6

ARGUMENT 7

 A. The SWC Is Entitled to Intervene As a Matter of Right..... 7

 1. The Motion to Intervene Is Timely..... 7

 2. The SWC and Its Members Have a Significant Protectable Interest
 in the Challenged Agency Decisions. 8

 3. The SWC’s Rights May be Impaired by the Outcome of this Case. 11

 4. The SWC’s Interests Are Not Adequately Represented. 12

 B. In the Alternative, the SWC Should Be Granted Permissive Intervention. 15

CONCLUSION 15

TABLE OF AUTHORITIES

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

Page(s)

Cases

Alliance for the Wild Rockies, Inc. v. U.S. Army Corps of Eng’rs,
No. 3:16-cv-01407-HZ (D. Or. Nov. 8, 2016)..... 10

Audubon Soc’y of Portland v. Jewell,
No. 1:17-CV-00069-CL, 2017 WL 9471665 (D. Or. Mar. 27, 2017) 10

Bay.org v. Zinke,
No. 1:17-cv-01176-LJO-EPG (N.D. Cal. Oct. 17, 2017) 9

Bennett v. Spear,
520 U.S. 154 (1997)..... 10

Cal. Trout, Inc. v. U.S. Bureau of Reclamation,
115 F. Supp. 3d 1102 (C.D. Cal. 2015) 8, 10

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,
152 F.3d 1184 (9th Cir. 1998)..... 13

Ctr. for Envtl. Law & Policy v. Bureau of Reclamation,
No. CV-09-160-RHW, 2010 WL 11507803 (E.D. Wash. Jan. 13, 2010) 11

Envtl. Def. Ctr. v. Bureau of Safety & Envtl. Enforcement,
No. 14-CV-928-PSG, 2015 WL 12734012 (C.D. Cal. 2015) 10

Freedom from Religion Found., Inc. v. Geithner,
644 F.3d 836 (9th Cir. 2011)..... 15

Friant Water Auth. v. Jewell,
No. 1:14-CV-000765-LJO-BAM, 2014 WL 2197942
(E.D. Cal. May 27, 2014)..... 10

Golden Gate Salmon Ass’n v. Ross,
No. 1:17-cv-01172-LJO-EPG (E.D. Cal. Oct. 17, 2017)..... 9

Greene v. United States,
996 F.2d 973 (9th Cir. 1993)..... 8

Kachess Cmty. Ass’n v. Bureau of Reclamation,
No. 1:19-CV-3155-RMP (E.D. Wash. Dec. 11, 2019) 10

League of United Latin Am. Citizens v. Wilson,
131 F.3d 1297 (9th Cir. 1997)..... 8

1 *Lockyer v. United States*,
 450 F.3d 436 (9th Cir. 2006)..... 11

2 *Natural Resources Defense Council v. Norton*,
 3 No. 05-16581, 2006 WL 1050147 (9th Cir. 2006)(unpublished) 9, 13, 14

4 *Nw. Forest Res. Council v. Glickman*,
 5 82 F.3d 825 (9th Cir. 1996)..... 8

6 *Sierra Club v. U.S. Env'tl. Prot. Agency*,
 7 995 F.2d 1478 (9th Cir. 1993)..... 8

8 *Smith v. Pangilinan*,
 9 651 F.2d 1320 (9th Cir. 1981)..... 15

10 *Sw. Ctr. for Biological Diversity v. Berg*,
 11 268 F.3d 810 (9th Cir. 2001)..... 9, 11, 13, 14

12 *Trbovich v. United Mine Workers of Am.*,
 13 404 U.S. 528 (1972)..... 13

14 *United States v. Alisal Water Corp.*,
 15 370 F.3d 915 (9th Cir. 2004)..... 8, 9

16 *United States v. City of Los Angeles*,
 17 288 F.3d 391 (9th Cir. 2002)..... 7, 8, 9, 13

18 *United States v. Oregon*,
 19 745 F.2d 550 (9th Cir. 1984)..... 8

20 *Wilderness Soc’y v. U.S. Forest Serv.*,
 21 630 F.3d 1173 (9th Cir. 2011) (en banc)..... 7, 8

22 **Statutes**

23 28 U.S.C. § 1367(a) 15

24 Administrative Procedure Act,
 25 5 U.S.C. § 706 7

26 Endangered Species Act,
 27 16 U.S.C. § 1531 *et seq* *passim*
 16 U.S.C. § 1536 5, 12

 National Environmental Policy Act 6, 7, 8, 10, 11

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Other Authorities

Fed. R. Civ. P. 24 11

Fed. R. Civ. P. 24(a)..... 8

Fed. R. Civ. P. 24(a)(2) 3, 7, 11

Fed. R. Civ. P. 24(b) 3, 15

Fed. R. Civ. P. 24(b)(3)..... 15

GLOSSARY

ABBREVIATION/ACRONYM	FULL TERM
2019 FWS BiOp	October 2019 U.S. Fish and Wildlife Service Biological Opinion
2019 NMFS BiOp	October 2019 National Marine Fisheries Service Biological Opinion
APA	Administrative Procedure Act
BiOps	2019 FWS BiOp collectively with the 2019 NMFS BiOp
CVP	Central Valley Project
Delta	San Francisco Bay/Sacramento-San Joaquin River Delta
DWR	California Department of Water Resources
EIS	Environmental impact statement
ESA	Endangered Species Act
FRCP	Federal Rules of Civil Procedure Rule
FWS	U.S. Fish and Wildlife Service
ITS	Incidental take statements
LTO	Long-term operations plan
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
Reclamation	U.S. Bureau of Reclamation
ROD	Record of decision signed by Reclamation on February 18, 2020
SWC	State Water Contractors
SWP	State Water Project
Water Authority	San Luis & Delta-Mendota Water Authority
Westlands	Westlands Water District

INTRODUCTION

1
2
3 The State Water Contractors (“SWC”), including its member agencies, should be granted
4 leave to intervene because the challenges to the biological opinions and the final environmental
5 impact statement (“EIS”) for the long-term, coordinated operation of the State Water Project
6 (“SWP”) and Central Valley Project (“CVP”) threaten the unique, protectable interests of the
7 SWC and its member agencies in SWP water supplies, the disposition of the action may as a
8 practical matter impair or impede the ability of the SWC and its member agencies to protect their
9 interests, no existing party adequately represents those interests, and this motion is timely.
10 Through their participation in the SWP, the SWC’s member agencies provide water to 27 million
11 Californians and 750,000 acres of farmland.

12 The federal and state governments—through the U.S. Bureau of Reclamation (“Reclamation”) and the California Department of Water Resources (“DWR”)—have put forth a long-term
13 operations plan (“LTO”) for the coordinated operation of the SWP and the CVP. The LTO
14 provides protection for species listed as threatened or endangered under the federal Endangered
15 Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”), through inclusion in the project description of
16 extensive operational limitations designed to avoid and minimize the direct and indirect effects of
17 the SWP and CVP water diversions, as well as approximately \$1.5 billion in conservation
18 measures. Reclamation and DWR designed the LTO to avoid both jeopardizing listed species and
19 the destruction or adverse modification of designated critical habitat through the incorporation of
20 extensive protective measures and conservation actions, the design and selection of which are
21 based upon decades of science and experience operating the SWP and CVP. As a result, the
22 2019 LTO and associated biological opinions at issue in this case target a level of protectiveness
23 of federally listed species that meets and exceeds that of any of the prior biological opinions for
24 coordinated state and federal operations of the SWP and CVP.

25 The SWC, including its member agencies—which include the Metropolitan Water District of
26 Southern California, Kern County Water Agency, Central Coast Water Agency, and Solano
27

1 County Water Agency—seeks intervention to protect the interests of the SWC’s member agencies
2 in the SWP. The SWC is a non-profit corporation composed of and representing 27 public water
3 agencies. The SWC has a unique interest—not represented by any other party to this case—in
4 defending the 2019 biological opinions challenged in this case. The SWC’s member agencies
5 fund the construction, operation, and maintenance of the SWP and provide water from the SWP
6 to millions of Californians and hundreds of thousands of acres of agricultural land, serving an
7 area from the Delta to the Bay Area, the central coast, central valley, and Southern California.

8 The operations of the SWP are regulated by biological opinions issued under the ESA, in
9 addition to several other state and federal authorizations. Proposed modifications to the existing
10 operations of the SWP and CVP as described in the LTO were evaluated in the biological
11 opinions and final EIS at issue in this case. The incidental take statements (“ITS”) that
12 accompany the biological opinions function as one of the authorizations for the operation of the
13 SWP.

14 Plaintiffs challenge the adequacy of these biological opinions, the ITS, and the final EIS, and
15 seek to have them held unlawful and set aside. This directly threatens the interests of the SWC in
16 two ways. First, Plaintiffs’ claims and requested relief challenge the protective operational
17 measures that the state and federal government have built into the LTO. This causes significant
18 uncertainty in water supply availability, potentially affecting the SWC’s members’ water supplies
19 from the SWP. Second, the SWC’s interests are threatened by this lawsuit, as it has invested
20 significant resources in Delta science, collaborative adaptive management, and habitat restoration.
21 The SWC has an interest in defending these investments in the Delta, as well as in defending the
22 approximately \$1.5 billion in conservation measures that are part of the LTO and to which the
23 SWC and its member agencies will contribute.

24 The existing Federal Defendants and the existing Intervenor-Defendants represent only the
25 interests of the CVP. As the only entities seeking intervention that have an interest in protecting
26 SWP operations and conservation measures, the SWC and its member agencies have strong and
27

1 unique interests in the LTO, the biological opinions, and the final EIS at issue that cannot be
2 adequately represented by the current parties. If this action were to proceed without the
3 participation of the SWC, its ability to protect its member agencies' interests in the SWP water
4 supplies and Delta ecosystem would be impaired. The SWC, therefore, seeks to intervene as of
5 right or, in the alternative, permissively.

6 **STATEMENT OF ISSUES TO BE DECIDED**

7 The issues to be decided under this Motion are:

- 8 (1) Whether the SWC has a right to intervene under Rule 24(a)(2) of the Federal Rules of
9 Civil Procedure ("FRCP"); and,
10 (2) Whether, in the alternative, the SWC should be permitted to intervene under FRCP 24(b).

11 **STATEMENT OF FACTS**

12 **A. The SWP and CVP**

13 The San Francisco Bay/Sacramento-San Joaquin River Delta ("Delta") is the largest estuary
14 on the west coast of the United States. Pierre Decl. ¶ 4. It is an integral part of California's water
15 delivery system—serving as a conduit for water that serves millions of people throughout
16 Northern, Central, and Southern California. *Id.* Water from the Delta is indispensable to the
17 agricultural industry and businesses that drive the State's economy. *Id.* The Delta also supports
18 an important ecosystem, serving as a migratory corridor for multiple species of anadromous fish
19 and habitat for resident fish, some of which are listed as threatened or endangered under the ESA.

20 The SWP and CVP are the foundation of California's water storage and delivery systems. *Id.*
21 ¶ 5. The SWP and CVP include a complex system of reservoirs, canals, and water pumps
22 spanning much of the state. *Id.* Water released from upstream reservoirs, flowing naturally
23 through the river system and Delta, is exported through SWP and CVP pumping plants at the
24 southern end of the Delta. *Id.* The SWP and CVP are managed through a coordinated operations
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1 agreement, which provides a framework for how the SWP and CVP meet state and federal water
2 quality and fishery standards. *Id.* ¶ 6.

3 The SWP is owned by the State of California and is operated by DWR. *Id.* ¶ 7. The SWP
4 includes 34 reservoirs; 20 pumping plants; 4 pumping-generating plants; 5 hydroelectric power
5 plants; and about 700 miles of pipelines and open canals that collectively stretch from Oroville
6 Reservoir, located on the Feather River in the north, to Perris Reservoir, located in Riverside
7 County in the south. *Id.* ¶ 8. By means of pumping facilities located near Tracy, California,
8 water is pumped by the SWP from the southern end of the Delta for delivery to the SWC's
9 member agencies and ultimately, to end-users in the southern San Francisco Bay area via the
10 South Bay Aqueduct, and in the San Joaquin Valley, along the Central Coast, and in Southern
11 California via the California Aqueduct. *Id.* ¶ 9. Particularly during winter months, when water is
12 not generally needed for agricultural uses, SWP facilities pump water from the Delta to storage in
13 San Luis Reservoir, a joint use facility shared by the state with the federal government that is
14 located near the City of Los Banos. *Id.* Such water is stored in the San Luis Reservoir until it is
15 needed for irrigation, municipal, and other uses. *Id.* Each of the 29 regional and local public
16 water supply agencies established under the laws of the State of California, including each of the
17 27 members of the SWC, is party to a long-term water supply contract with DWR that entitles it
18 to participate in the SWP, and all but 3 SWC member agencies receive SWP supplies diverted
19 from the Delta. *Id.* ¶ 10. The SWC's member agencies have the right to use the SWP
20 conveyance system, and to receive a contracted water amount pursuant to an annual allocation
21 that DWR makes based on availability, which depends on precipitation, snowpack, available
22 storage, water quality and other environmental regulations, and other factors. *Id.* ¶ 11. These
23 water supply contracts are central to the SWP's construction and operation as the water
24 contractors fund all SWP capital and operating costs associated with storage and conveyance. *Id.*
25 ¶ 12.

1 **B. Endangered Species Act Consultation**

2 On August 2, 2016, Reclamation and DWR jointly requested the reinitiation of consultation
3 on the coordinated operations of the SWP and CVP, which—since 2008 and 2009—have been
4 regulated in part by biological opinions issued by the U.S. Fish and Wildlife Service (“FWS”)
5 and the National Marine Fisheries Service (“NMFS”). Those agencies accepted the reinitiation
6 requests on August 3, 2016 and August 17, 2016, respectively.

7 On January 31, 2019, Reclamation issued its Biological Assessment, which identified and
8 analyzed a proposed action for coordinated operations of the SWP and CVP—the LTO. Over the
9 subsequent 10 months, Reclamation updated the Biological Assessment, and the proposed action
10 therein, to include additional protective actions and conservation measures to address concerns
11 regarding the status of the species. The final Biological Assessment includes a suite of
12 operational criteria and conservation measures that are designed to be the same or more protective
13 of ESA-listed species than the criteria and measures under the 2008-2009 biological opinions.
14 Pierre Decl. ¶ 14.

15 On October 21, 2019, NMFS issued the *Biological Opinion on Long-Term Operation of the*
16 *Central Valley Project and State Water Project* (“2019 NMFS BiOp”), and FWS issued the
17 *Biological Opinion for the Reinitiation of Consultation on the Coordinated Operations of the*
18 *Central Valley Project and State Water Project* (“2019 FWS BiOp”)(collectively, the “BiOps”),
19 pursuant to section 7 of the ESA, 16 U.S.C. § 1536. Pierre Decl. ¶ 15. The 2019 FWS BiOp
20 addresses the effects of the LTO, as described in the Biological Assessment, on the delta smelt, as
21 well as several terrestrial endangered and threatened species, and their designated critical habitats.
22 Pierre Decl. ¶ 17. The 2019 FWS BiOp concludes that the proposed LTO is not likely to
23 jeopardize the continued existence of delta smelt or destroy or adversely modify the delta smelt’s
24 critical habitat. *Id.* The 2019 FWS BiOp’s no jeopardy and no adverse modification conclusions
25 are reasonable, adequately explained, and supported by robust analysis.

1 The 2019 NMFS BiOp addresses the effects of the LTO, as described in the Biological
2 Assessment, on Central Valley steelhead, winter-run and spring-run Chinook salmon, green
3 sturgeon, and Southern Resident killer whales and their critical habitat. *Id.* ¶ 16. The 2019
4 NMFS BiOp concludes that the proposed LTO is not likely to jeopardize the continued existence
5 of such species or destroy or adversely modify their critical habitats. *Id.* The 2019 NMFS
6 BiOp’s no jeopardy and no adverse modification conclusions are reasonable, adequately
7 explained, and supported by robust analysis. The BiOps support a new paradigm that allows the
8 SWP and CVP to operate in a manner that protects and enhances fish and wildlife more
9 effectively than the prior biological opinions, while also continuing to provide water supply for
10 millions of Californians.

11 **C. National Environmental Policy Act Analysis**

12 In conjunction with the reinitiated ESA consultation, in December 2017, Reclamation issued a
13 Notice of Intent to Prepare an EIS pursuant to the National Environmental Policy Act (“NEPA”)
14 for the purpose of continuing the operation of the CVP in a coordinated manner with the SWP for
15 its authorized purposes; in a manner that enables Reclamation and DWR to maximize water
16 deliveries consistent with applicable laws, contractual obligations, and agreements; and to
17 augment operational flexibility by addressing the threatened or endangered status of listed
18 species. Reclamation issued its draft EIS in July 2019. The SWC submitted comments on the
19 draft EIS. Reclamation issued the final EIS in December 2019, which analyzed a no action
20 alternative and four action alternatives, including Reclamation’s preferred alternative. The
21 preferred alternative was the proposed action transmitted in Reclamation’s Biological
22 Assessment, as refined over the course of ESA consultation. On February 18, 2020, Reclamation
23 signed the record of decision (“ROD”), approving Reclamation’s preferred alternative.

24 **D. The Current Dispute**

25 Plaintiffs Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries
26 Resources, Golden State Salmon Association, Natural Resources Defense Council, Inc.,
27

1 Defenders of Wildlife, and Bay.Org d/b/a The Bay Institute (collectively, “Plaintiffs”) filed the
2 Complaint against Defendants—NMFS, FWS, and their official representatives—on December 2,
3 2019. Plaintiffs allege that the BiOps are arbitrary and capricious, abuses of discretion, and
4 otherwise not in accordance with the law, in violation of the Administrative Procedure Act
5 (“APA”), 5 U.S.C. § 706. ECF No. 1. On February 24, 2020, Plaintiffs filed a First Amended
6 Complaint, adding Reclamation as a Defendant, and asserting a claim for relief based on alleged
7 violations of NEPA and the APA. ECF No. 52. Plaintiffs seek an order setting aside the BiOps
8 and invalidation of Reclamation’s final EIS under NEPA. *Id.*

9 ARGUMENT

10 The SWC seeks to intervene as a matter of right, or in the alternative, permissively.

11 **A. The SWC Is Entitled to Intervene As a Matter of Right.**

12 An applicant is entitled to intervene as a matter of right under FRCP 24(a)(2) if: (1) the
13 motion is timely; (2) the applicant claims a “significantly protectable” interest relating to the
14 property or transaction which is the subject of the action; (3) the disposition of the action may as
15 a practical matter impair or impede the applicant’s ability to protect that interest; and (4) the
16 applicant’s interest is inadequately represented by the parties to the action. *Wilderness Soc’y v.*
17 *U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc). In evaluating these factors, the
18 U.S. Court of Appeals for the Ninth Circuit takes into account “practical and equitable
19 considerations” and construes FRCP 24(a)(2) “broadly in favor of proposed intervenors.” *United*
20 *States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (citation omitted). The Ninth
21 Circuit has a longstanding liberal policy in favor of granting intervention. *Id.* at 397–98. As
22 demonstrated below, the SWC and its members meet each of the requirements for intervention as
23 a matter of right.

24 **1. The Motion to Intervene Is Timely.**

25 This Motion to Intervene is timely. In determining whether a motion is timely, the Ninth
26 Circuit considers the following three factors: “(1) the stage of the proceeding at which an
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1 applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of
 2 the delay.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (citation
 3 omitted); *see also United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984); *League of United*
 4 *Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1303–04 (9th Cir. 1997).

5 Because the litigation is still in the very early stages, the SWC and its members’ intervention
 6 will not cause delay or otherwise prejudice the existing parties. The Court has not yet engaged
 7 substantively with the issues. Federal Defendants have not yet filed a pleading in response to the
 8 Complaint.¹ *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996)
 9 (intervention timely where the defendant had not filed an answer); *Sierra Club v. U.S. Envtl. Prot.*
 10 *Agency*, 995 F.2d 1478, 1481 (9th Cir. 1993), *abrogated on other grounds by Wilderness Soc’y*,
 11 630 F.3d at 1179; *Cal. Trout, Inc. v. U.S. Bureau of Reclamation*, 115 F. Supp. 3d 1102, 1118
 12 (C.D. Cal. 2015) (same). Further, on February 24, 2020, Plaintiffs filed their First Amended
 13 Complaint with an additional claim under NEPA and requesting additional relief. ECF No. 52.

14 **2. The SWC and Its Members Have a Significant Protectable Interest in the**
 15 **Challenged Agency Decisions.**

16 The interest prong of FRCP 24(a) is “primarily a practical guide to disposing of lawsuits by
 17 involving as many apparently concerned persons as is compatible with efficiency and due
 18 process.” *City of Los Angeles*, 288 F.3d at 398 (citation omitted). An applicant has a “significant
 19 protectable interest” in an action if: “(1) it asserts an interest that is protected under some law, and
 20 (2) there is a relationship between its legally protected interest and the plaintiff’s claims.” *Id.*
 21 (internal quotations and citation omitted); *see also Wilderness Soc’y*, 630 F.3d at 1176 (applying
 22 the same test in the NEPA context). This test is a “practical, threshold inquiry” for which “[n]o
 23 specific legal or equitable interest need be established.” *Greene v. United States*, 996 F.2d 973,
 24

25 ¹ Federal Defendants filed a motion to transfer venue on February 7, 2020. ECF No. 40. Such
 26 motion is currently pending before the Court. In anticipation of such motion, the Court
 27 previously extended Federal Defendants’ deadline for filing a responsive pleading until thirty
 days after this Court enters an order deciding Federal Defendants’ motion to transfer. ECF No.
 31.

1 976 (9th Cir. 1993) (citation omitted). If the applicant’s claimed interest relates to the underlying
2 subject-matter of the litigation, the applicant has satisfied the interest standard for mandatory
3 intervention. *See Alisal Water*, 370 F.3d at 919–20. An applicant generally shows that there is a
4 “relationship” by showing that the resolution of the plaintiff’s claim will affect the applicant.
5 *City of Los Angeles*, 288 F.3d at 398.

6 The SWC’s member agencies each have a long-term water supply contract with DWR that
7 entitles it to participate in the SWP. Pierre Decl. ¶ 10. The SWC, and its member agencies, pay
8 to participate in the SWP and their water supplies may be directly impacted by this litigation. *Id.*
9 ¶ 13. As the providers of water to millions of Californians and 750,000 acres of farmland, the
10 SWC’s members have a protectable interest in the regulation of Delta water supplies from the
11 SWP, which is a significant source of water for all of the SWC’s members. *Id.* ¶¶ 2, 18. The
12 issues presented in this case directly impact the ability of the SWC’s members to receive reliable
13 SWP water deliveries, and have the potential to impact the quantity of water available to the
14 SWC’s member agencies. Each of these things threaten the stability of the water supply, leading
15 to water insecurity. *Id.* ¶ 19.

16 Contract rights, such as those held by SWC’s member agencies are “traditionally protectable
17 interests.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). Indeed,
18 on multiple occasions, California district courts have relied upon the SWC’s member agencies’
19 contractual interests in SWP water as supporting intervention in directly analogous cases
20 involving litigation over prior biological opinions regulating the SWP. In *Natural Resources*
21 *Defense Council v. Norton*, No. 05-16581, 2006 WL 1050147 at *2 (9th Cir. 2006)(unpublished),
22 the SWC and its members were granted leave to intervene as a matter of right in an action
23 brought against FWS and NMFS regarding the adequacy of prior biological opinions pertaining to
24 the coordinated operations of the CVP and SWP. Similarly, in *Golden Gate Salmon Ass’n v.*
25 *Ross*, No. 1:17-cv-01172-LJO-EPG, ECF No. 35 (E.D. Cal. Oct. 17, 2017), and *Bay.org v. Zinke*,
26 No. 1:17-cv-01176-LJO-EPG, ECF No. 40 (N.D. Cal. Oct. 17, 2017), the SWC and its members
27

1 were granted leave to intervene as a matter of right in actions brought against FWS and NMFS
2 regarding the adequacy of biological opinions with respect to California WaterFix—a project
3 seeking to add additional points of diversion on the Sacramento River and tunnels, forebays and a
4 pumping plant to the SWP to be operated in coordination with the existing SWP and CVP
5 facilities in the Delta.

6 These cases are consistent with decisions from the U.S. Supreme Court, the Ninth Circuit, and
7 district courts throughout the Ninth Circuit that recognize that water contractors have a significant
8 protectable interest in actions under the ESA. *Bennett v. Spear*, 520 U.S. 154, 167 (1997)
9 (irrigation district’s interest in protecting its water supply is a legally cognizable interest under the
10 ESA); *Cal. Trout*, 115 F. Supp. 3d at 1118–19 (interests of irrigation districts in an ESA
11 challenge are sufficient to meet the “interest” test); *Friant Water Auth. v. Jewell*, No. 1:14–CV–
12 000765–LJO–BAM, 2014 WL 2197942, at *1 (E.D. Cal. May 27, 2014) (granting intervention to
13 the Water Authority and Westlands in an action challenging Reclamation’s water release from
14 Millerton Lake/Friant Dam, from which they were legally entitled to receive water as part of the
15 CVP); *Kachess Cmty. Ass’n v. Bureau of Reclamation*, No. 1:19–CV–3155–RMP, ECF No. 20
16 (E.D. Wash. Dec. 11, 2019) (granting intervention to irrigation district in lawsuit challenging the
17 federal defendants’ ESA compliance); *Alliance for the Wild Rockies, Inc. v. U.S. Army Corps of*
18 *Eng’rs*, No. 3:16–cv–01407–HZ, ECF No. 28 (D. Or. Nov. 8, 2016) (granting intervention to
19 irrigation district in lawsuit challenging the federal defendants’ ESA compliance on Yakima
20 Project dams).

21 Similarly, district courts throughout the Ninth Circuit have found that an applicant for
22 intervention has a sufficient interest to intervene in a NEPA case based on its contractual
23 interests. *Audubon Soc’y of Portland v. Jewell*, No. 1:17–CV–00069–CL, 2017 WL 9471665, at
24 *3 (D. Or. Mar. 27, 2017) (granting intervention to farmers with contractual rights in leases of
25 farmland and to irrigation district with right to revenue from such leases in NEPA challenge
26 related to a plan to extend agricultural leasing of land); *Envtl. Def. Ctr. v. Bureau of Safety &*
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1 *Envtl. Enforcement*, No. 14-CV-928-PSG, 2015 WL 12734012 (C.D. Cal. 2015) (granting
2 intervention to permit awardees in a challenge to a NEPA analysis associated with issuance of
3 such permits); *Ctr. for Env'tl. Law & Policy v. Bureau of Reclamation*, No. CV-09-160-RHW,
4 2010 WL 11507803, at *2 (E.D. Wash. Jan. 13, 2010) (granting intervention to irrigation district
5 in NEPA challenge, where adverse injunctive ruling would impair its contractual interest in
6 delivery of irrigation water).

7 Accordingly, the SWC meets the “interest” test and has significant protectable interests in this
8 case. There is also a direct relationship between the SWC’s interests and Plaintiffs’ claims.
9 Although Plaintiffs challenge actions of the federal government, their lawsuit affects the State of
10 California, the SWP, and the SWC. Plaintiffs seek to invalidate the final EIS, as well as the 2019
11 BiOps and the accompanying ITS. The BiOps were issued on the coordinated operations of the
12 SWP and CVP. Both Reclamation and DWR must comply with the ITS, and the ITS’ protective
13 coverage applies to both the state’s operations of the SWP and Reclamation’s operation of the
14 CVP. The ITS provide coverage for the take of listed species (i.e. an exemption from the ESA’s
15 prohibition on take), without which the SWP and CVP could not lawfully operate. Invalidation of
16 the final EIS, the BiOps, and the ITS could result in changes in coordinated operations, creating
17 water insecurity and threatening the reliability of SWP water deliveries to the SWC’s members
18 under their contracts. Pierre Decl. ¶ 19.

19 **3. The SWC’s Rights May be Impaired by the Outcome of this Case.**

20 The third prong of the inquiry is whether “disposing of the action may as a practical matter
21 impair or impede the movant’s ability to protect its interest.” FRCP 24(a)(2). Generally, after
22 determining an applicant has a protectable interest, courts have “little difficulty concluding” that
23 the disposition of the case may affect that interest. *Lockyer v. United States*, 450 F.3d 436, 442
24 (9th Cir. 2006). Applicants need only demonstrate that their interests “would be substantially
25 affected in a practical sense.” *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822 (quoting FRCP
26 24 advisory committee’s note).

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1 This lawsuit threatens the interests of the SWC and its members because Plaintiffs, in
2 challenging the BiOps, are asking this court to hold unlawful and set aside the ITS for the LTO,
3 which authorizes the SWP's incidental "take" of listed species. Without this ITS, the SWP
4 cannot divert water without risking violation of the ESA's take prohibition. Moreover, Plaintiffs
5 seek to enjoin any actions in reliance on the BiOps and the final EIS. Further, Plaintiffs seek an
6 order requiring Federal Defendants to withdraw the BiOps and reinitiate consultation under
7 section 7 of the ESA, which would cause delay and significant uncertainty with respect to
8 managing water exported by the SWP for the duration of such consultation. Pierre Decl. ¶ 19.
9 Further, the relief Plaintiffs seek both with respect to the BiOps and the final EIS may prompt
10 Reclamation and DWR to modify the proposed LTO, impairing current and future SWP supplies.
11 *Id.* ¶ 21. Moreover, current and future SWP supplies will be affected by conditions imposed on
12 such operations through future ESA consultations. *Id.* ¶ 20. Since Proposed Intervenors depend
13 on the SWP for a significant portion of their water supplies, this action fundamentally affects the
14 SWC's member agencies, and, ultimately, those who reside and work within their service areas.
15 Pierre Decl. ¶ 21.

16 Moreover, the SWC's interests are threatened by this lawsuit because the SWC and its
17 members have invested and continue to invest in habitat restoration activities in the Delta, and
18 have an ongoing interest in these activities. As part of the proposed LTO, DWR on behalf of the
19 SWC's member agencies, committed to contribute to conservation actions to protect listed
20 species, the total cost of which is anticipated at \$1.5 billion. *Id.* ¶ 23. These conservation
21 measures are part of the LTO project description that was designed to protect species. An order
22 requiring withdrawal of the BiOps and the reinitiation of consultation sought by Plaintiffs could
23 result in revisions or changes to these conservation measures.

24 **4. The SWC's Interests Are Not Adequately Represented.**

25 The interests of the SWC and its members are not adequately represented by Federal
26 Defendants, the Water Authority, or Westlands. These entities have interests in and are
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1 responsible for, the federal CVP. They have no interest in, or responsibility for, the SWP. There
2 is no party in this case that represents the interests of the SWC or the state of California.

3 The Supreme Court has stated that the burden of demonstrating the inadequacy of
4 representation should be treated as “minimal.” *Trbovich v. United Mine Workers of Am.*, 404
5 U.S. 528, 538 n.10 (1972); *see also Sw. Ctr. for Biological Diversity*, 268 F.3d at 823. The Court
6 must consider:

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

10 *City of Los Angeles*, 288 F.3d at 398 (citation omitted). Although there is a presumption that a
11 governmental entity represents the interests of its citizens, this presumption may be overcome
12 where the applicant’s interests are narrower than the interest of the public. *See Californians for*
13 *Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998).
14 Merely sharing the same objective with a government defendant is not enough to demonstrate that
15 the applicant’s interest is adequately represented. *Sw. Ctr. for Biological Diversity*, 268 F.3d at
16 823.

17 The Ninth Circuit has previously found that the SWC’s interests are not adequately
18 represented by federal agencies in ESA litigation challenging biological opinions pertaining to the
19 SWP in a case almost identical to the one at hand. In *Natural Resources Defense Council v.*
20 *Norton*, the Ninth Circuit considered whether the SWC was entitled to mandatory intervention in
21 an action challenging the adequacy of a biological opinion addressing the previously proposed
22 coordinated operations of the CVP and SWP. 2006 WL 1050147 at *1. The Ninth Circuit
23 concluded that the SWC’s interests were not adequately represented, explaining:

24 given the Contractors’ members’ exclusive interest in a majority of the water
25 contracts issued from the State Water Project and Contractors’ unique interest in
26 defending the South Delta Improvement Program, there is no assurance that all of
27 the Contractors’ arguments will be addressed if they are not included as parties to
this action. Moreover, as a result of its exclusive interest in the State Water Project
and the South Delta Improvement Program, there are serious doubts that the

1 existing parties would protect those interests to the same extent, particularly if the
parties were to enter into settlement discussions.

2 *Id.* The Ninth Circuit’s reasoning in *Norton* is highly relevant to this case. Just as in *Norton*, the
3 SWC’s interests are not adequately represented by the Federal Defendants or Defendant-
4 Intervenor.

5 As recognized in *Norton*, the SWC does not share the same objective with the Federal
6 Defendants and the Defendant-Intervenors. The SWC and its member agencies are primarily
7 concerned with operations and regulatory requirements related to the SWP. The Federal
8 Defendants are concerned with ESA compliance. The Federal Defendants and the existing
9 Defendant-Intervenors are concerned with operations and regulatory requirements related to the
10 CVP. Protecting the particular interests of adequate, reliable, high-quality water supplies from
11 the SWP and the rights of SWC’s members to receive SWP water conveyed across and diverted
12 from the Delta is not the primary interest of the Federal Defendants or the existing Defendant-
13 Intervenor. Given these differences, there is no guarantee that Federal Defendants or the
14 existing Defendant-Intervenors “will undoubtedly make all [of the Water Contractors]
15 arguments.” *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822 (citation omitted).

16 Although Plaintiffs disputed the Water Authority and Westlands’ motion to intervene as a
17 matter of right, arguing that they failed to demonstrate that their interest would not be adequately
18 represented by Federal Defendants, the SWC and its members are not similarly situated to the
19 Water Authority and Westlands in this respect. The Water Authority and Westlands represent
20 entities or persons that have contracts with Reclamation and draw all or most of their water from
21 the federal CVP. Conversely, the SWC represents nearly all of the public agencies that hold
22 contracts with DWR for SWP water supplies, and the SWC’s members account for nearly all of
23 the entitlements to SWP water. *Pierre Decl.* ¶ 3. None of the Federal Defendants, the Water
24 Authority, or Westlands has the interests held by the SWC and its members in defending against
25 the challenges to the SWP and protecting the water furnished to SWC pursuant to its participation
26 in the SWP.

1 **B. In the Alternative, the SWC Should Be Granted Permissive Intervention.**

2 In the alternative, the SWC and its members meet the test for permissive intervention under
3 FRCP 24(b). The SWC and its members have “(1) an independent ground for jurisdiction; (2) a
4 timely motion; and (3) a common question of law and fact between the movant’s claim or defense
5 and the main action.” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th
6 Cir. 2011) (citation omitted). Courts have broad discretion to grant permissive intervention.
7 *Smith v. Pangilinan*, 651 F.2d 1320, 1325–26 (9th Cir. 1981).

8 First, where, as here, an applicant for intervention in a federal-question case brings no new
9 claims, the jurisdictional concern drops away. *Freedom from Religion Found.*, 644 F.3d at 844.
10 Second, as explained above, this Motion is timely, will not delay the proceedings, and will not
11 result in any prejudice to the existing parties. FRCP 24(b)(3). Third, the SWC’s defenses raise
12 common questions as Plaintiffs’ case because the SWC seeks to defend directly against Plaintiffs’
13 action. Hence the SWC’s proposed answer is so related to Plaintiffs’ claims it is necessarily
14 within the Court’s supplemental jurisdiction over matters that are part of the same “case or
15 controversy.” 28 U.S.C. § 1367(a). Such supplemental jurisdiction expressly includes “claims
16 that involve the joinder or intervention of additional parties.” *Id.*

17 With respect to permissive intervention, the SWC’s members are customers of the SWP,
18 which is comparable to the Water Authority and Westlands, who are customers of the CVP. The
19 Court granted the Water Authority and Westlands permissive intervention. Therefore, should the
20 Court find that the SWC is not entitled to intervention as of right, the Court should grant
21 permissive intervention to the SWC under the same reasoning relied on to grant the Water
22 Authority and Westlands’ request for permissive intervention.

23 **CONCLUSION**

24 For the foregoing reasons, the SWC respectfully requests that its Motion to Intervene be
25 granted.

26 DATED this 3rd day of March, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2020, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will send notification to the attorneys of record in this case.

/s/ Allison McAdam
Allison McAdam, CA # 226836