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8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA
 11

12
 13 **FRIENDS OF THE RIVER, A NON-PROFIT
 CORPORATION, DEFENDERS OF
 14 WILDLIFE, A NON-PROFIT CORPORATION,
 AND CENTER FOR BIOLOGICAL
 15 DIVERSITY, A NON-PROFIT CORPORATION,**
 16 Plaintiffs,
 17 **CALIFORNIA DEPARTMENT OF FISH
 AND GAME,**
 18 Applicant for Intervention
 as Plaintiff-Intervenor,
 19
 20 v.
 21 **UNITED STATES ARMY CORPS OF
 ENGINEERS, AND LT. GEN. ROBERT L.
 22 VAN ANTWERP, JR., IN HIS OFFICIAL
 CAPACITY**
 23 Defendants.
 24

Case No. 2:11-CV-01650-JAM-JFM

**CALIFORNIA DEPARTMENT OF FISH
 AND GAME'S MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION TO
 INTERVENE AS PLAINTIFF-
 INTERVENOR**

Date: December 7, 2011
 Time: 9:30 a.m.
 Ctrm: 6
 Judge: The Honorable John A. Mendez
 Trial Date: None Set
 Action Filed: June 20, 2011

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INTRODUCTION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the California Department of Fish and Game (“DFG”) moves to intervene as a matter of right as a plaintiff-intervenor in the above-entitled action. This action alleges that the U.S. Army Corps of Engineers’ (“Corps”) violated two federal laws in adopting its policy mandating the removal of trees and shrubs from levees in California and across the United States. (“vegetation removal policy”): (1) the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347 by failing to prepare an Environmental Impact Statement (“EIS”) and (2) the federal Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544 by failing to consult with the federal Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) prior to the adoption of the vegetation removal policy.

The vegetation removal policy threatens to remove significant habitat for many of California’s fish and wildlife resources, including threatened and endangered species. For example, the trees and shrubs on California’s Central Valley levees constitute approximately the last five percent of the historic riparian vegetation left in the Central Valley. Yet the adverse environmental effects of removing this habitat were not examined prior to implementation of this policy, nor were measures to avoid jeopardy to these resources identified.

In California, DFG has the primary responsibility for protecting fish and wildlife resources including their habitat. DFG also has an interest in protecting the integrity of California’s levee system and there is evidence that removal of trees and shrubs can negatively affect levee stability. Failed levees and resulting flooding not only adversely effect the human population, but it also has adverse effects on fish and wildlife resources. Thus DFG has significant interests in ensuring that the Corps complies with the necessary federal environmental laws prior to adoption and implementation if its’ vegetation removal policy.

Based on these interests and because DFG meets the criteria for intervention as a matter of right (the motion is timely, DFG has significant interests in the policy, the disposition of this matter may adversely affect DFG’s interests, Plaintiffs cannot adequately represent DFG’s interests), DFG respectfully requests that this Court grant DFG intervenor status in this case.

DFG STATUTORY MANDATES

1
2 California’s fish and wildlife resources are held in trust for California’s citizens by and
3 through the DFG. Cal. Fish & Game Code § 711.7(a). The California legislature has determined
4 that the protection and conservation of fish and wildlife resources are of the utmost public
5 interest. Fish and wildlife resources provide a major contribution to California’s economy. Cal.
6 Fish & Game Code § 1600. Both aquatic and wildlife species provide intrinsic and ecological
7 values, enjoyment and recreational benefits to the people of California. Cal. Fish & Game Code
8 §§ 1700, 1801. Regarding endangered and threatened species, the California Endangered Species
9 Act (“CESA”) states that all California agencies are charged to conserve these species. Cal. Fish
10 & Game Code § 2055. In particular, agencies are not to approve any project, including levee
11 repair and maintenance, that would jeopardize the continued existence of such species or that
12 would result in the destruction or adverse modification of habitat essential to their continued
13 existence, if there are alternatives that would conserve the species or its habitat. Cal. Fish &
14 Game Code § 2055.

15 DFG is the state agency charged with implementation of the CESA. Cal. Fish & Game
16 Code §§ 2050-2089. For example, DFG is authorized to issue a permit permitting the “take” of a
17 threatened or endangered species that is incidental to lawful activity, if the “take” does not
18 jeopardize the continued existence of the species in question and the impacts of the authorized
19 take are minimized and fully mitigated. Cal. Fish & Game Code §§ 2081(b)(1), (b)(2) & (c).
20 Also, DFG acts as the California Fish and Game Commission’s scientific advisor by evaluating
21 and reviewing petitions, and making recommendations thereon, to list species pursuant to CESA.
22 Cal. Fish & Game Code §§ 2073.5, 2074.6. DFG is responsible for the enforcement of the CESA
23 as well. Cal. Fish & Game Code §§ 2580–2589. In addition to its civil enforcement authority,
24 DFG wardens enforce the state laws relating to the protection of fish and game, with all the
25 powers conferred by law on peace officers. Cal. Fish and Game Code § 878.

26 DFG is also responsible for enforcing and implementing other laws protecting fish and
27 wildlife resources in California’s Fish and Game Code. For example, under the Lake and Stream
28 Bed Alteration Program, DFG is charged with protecting fish and wildlife by regulating, in part,

1 any substantial change or use of material from the bed, channel, or bank of any river, stream or
2 lake. Cal. Fish & Game Code § 1600–1616. If DFG determines that the regulated activity may
3 substantially adversely affect an existing fish or wildlife resource, DFG may enter into an
4 agreement with the regulated entity to implement measures that protect the affected fish and
5 wildlife resources. Cal. Fish & Game Code §§ 1602, 1603, 1615. Additionally, DFG is
6 responsible for the implementation and enforcement of the Natural Community Conservation
7 Planning Act, which provides a mechanism for compliance with CESA through the development
8 of comprehensive, broad-scale conservation plans that focus on the needs of natural communities
9 and the range of species that inhabit them. Cal. Fish & Game Code §§ 2800–2835.

10 DFG’s mission to protect and conserve California’s wildlife extends to California’s levee
11 system, with California’s Bay-Delta having special importance for urban and agriculture water
12 supply and threatened and endangered species. *In re Bay-Delta Programmatic Environmental*
13 *Impact Report Coordinated Proceedings*, 43 Cal.4th 1143, 1151 (2008). The California
14 legislature has declared that the Bay-Delta located in California’s Central Valley is endowed with
15 valuable and unique resources including highly productive agriculture and recreation assets,
16 fisheries and wildlife environments. Many of these resources have been created or preserved as a
17 direct result of the levee system. Cal. Water Code § 12981. The levee system is to control flood
18 waters in a manner that protects life and property as well as fish, wildlife and recreational values.
19 Cal. Water Code §§ 12578, 12582, 12582.5. Thus DFG’s role extends to the impact of California
20 levees on California’s fish and wildlife resources.

21 **ISSUE STATEMENT**

22 Whether DFG is entitled to intervene in this litigation as a matter of right, pursuant to
23 Federal Rules of Civil Procedure, Rule 24(a)(2)?

24 **BACKGROUND AND STATEMENT OF FACTS**

25 The state-federal flood protection system is located in California’s Central Valley and
26 consists of approximately 1,600 miles of federal project levees, 1,200 miles or 148,000 acres of
27 designated floodways, 26 project channels covering several thousand acres and 56 other major
28 flood protection works along the Sacramento and San Joaquin rivers and tributaries. See attached

1 Plaintiff-Intervenor, Exhibit 1 Comments at 2.¹ The system includes federally authorized projects
2 with the State directly and with local entities that work directly with the federal government.
3 Comments at 2. Since 1917, the federal government has partnered with California in addressing
4 California's flood control issues since 1917. Vegetation management on California's levees has
5 long been part of the federal flood control efforts in California.

6 Traditionally, the Corps has allowed and even encouraged the retention of trees and shrubs
7 on Central Valley levees. As early as 1955, the Corps has provided direction to California for the
8 maintenance and operation of various levees in the Central Valley. In a Standard Operation &
9 Manual for the Sacramento River Flood Control Project, the Corps provided that "brush and small
10 trees may be retained on the waterward slope where desirable for the prevention of erosion and
11 wave wash. Comments at 4. Several studies have been conducted since 1955 that support the
12 desirability of vegetation on levees in the Central Valley.² Studies have demonstrated that levee
13 vegetation provides valuable habitat and enhances levee stability. Comments at 1-9, 13. The
14 Corps' own regulations recognize that vegetation on levees often improves levee safety. 33
15 C.F.R. § 208.

16 California's levee system contains the last remnants of a riparian forest that once covered
17 the Central Valley. Comments at 12. This remaining riparian forest provides habitat for many
18 fish and wildlife resources, including several federal and California threatened and endangered
19

20
21 ¹ Plaintiff-Intervenor, Exhibit 1 dated April 15, 2010, contains the extensive comments by
22 DFG and the California Department of Water Resources on the Corps' vegetation removal and
23 variance policies. (*See* attached Declaration of Deborah L. Barnes attesting to the comments as
true and correct copies.) In this motion, the comments portion of Exhibit 1 is referred to as
"Comments," and the cover letter portion of the comments is referred to as "Comments cover
letter."

24 ² *See, e.g.*" (1) Pilot Levee Maintenance Study (DWR, 1967) which concluded that native
25 riparian and other plant species can be maintained and propagated and are compatible with the
26 flood control function – these results were adopted by the Corps; (2) Shields Studies (Corps,
1991-92) revealing that after a record level 1986 flood on the Sacramento River, the damage on
27 levees with supporting woody vegetation was lower than for un-vegetated levees; and, (3) Post
Flood Assessment (Corps, 1999) indicating that while vegetation limited channel capacity in a
flood, there was not any damage to levees. Comments at 7.

1 species, such as the Swainson's hawk, valley elderberry long-horn beetle, winter-run and spring-
2 run Chinook salmon and Central Valley Steelhead. Comments at 12.

3 Notwithstanding this body of scientific evidence regarding the desirability of levee
4 vegetation, in April of 2009, the Corps issued Engineering Technical Letter No. 1110-2-571 -
5 Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls,
6 Embankment Dams, and Appurtenant Structures, ("ETL No. 1110-2-571").³ Comments at 24.
7 ETL No. 1110-2-571 mandates a vegetation- free zone surrounding all levees, floodwalls,
8 embankment dams, and other critical appurtenant structures. The only allowed vegetation is
9 grasses. Comments at 25-26. The mandated vegetation free corridor must be wide and tall
10 enough to accommodate all access requirements, with a minimum height of 8 feet, a minimum
11 width of the width of the levee in question, plus 15 feet on each side. *See* attached Plaintiff-
12 Intervenor, Exhibit 2, ETL at 2-1.⁴ The vegetation free zone can be enlarged but not diminished
13 without a variance from the Corps. ETL at 2-2. The only acceptable vegetation is perennial
14 grasses that can tolerate mowing to heights as low as 3 inches. ETL at 4-3.

15 All existing vegetation that is not in compliance with ETL No. 1110-2-571 is to be
16 removed. ETL at 5-1. This mandate includes vegetation that provides habitat for threatened or
17 endangered species. For example in areas with endangered or threatened species, levee owners
18 and operators are required to seek clearance from the FWS and while its not stated, California
19 levee owners and operators would also have to consult with DFG. ETL at 5-1.

20 The Corps did not prepare any NEPA document or consult with the FWS or NMFS in
21 connection with ETL No. 1110-2-571.

22 In February of 2010, the Corps issued a draft Policy Guidance Letter ("PGL") detailing the
23 process that must be used in order to obtain a variance from the policies mandated by ETL No.

24 _____
25 ³ ETL No. 1110-2-571 was issued after the Corps completed a "Final Draft White Paper,
26 Treatment of Vegetation Within Local Flood Damage Reduction Systems" in April, 2007 and
after the Corps issued its "Interim Vegetation Guidance for Control Vegetation on Levees" in
June of 2007.

27 ⁴ Plaintiff-Intervenor, Exhibit 2 is a true and correct copy of ETL No. 1110-2-571 and is
28 referred to in this motion as "ETL".

1 1110-2-571. The variance process is extensive, arduous and makes exceptions to ETL No. 1110-
2 2-571, difficult to obtain. For example, all previous variances or exemptions from the Corps's
3 prior vegetation removal policy were set aside and new applications complying with the PGL
4 rules had to be submitted if a flood control agency wanted a variance. 75 Fed.Reg. 6364 (Feb. 9,
5 2010). In order to obtain a new variance, the new PGL rules require the flood control agency to
6 undergo an extensive justification process that includes compliance with all applicable
7 environmental studies and documentation, including NEPA, ESA, and in California, the
8 California Environmental Quality Act ("CEQA") Cal. Pub.Res. Code §§ 21000-21177 and
9 CESA, Cal. Fish & Game Code, §§ 2050-2115.5. 75 Fed.Reg. 6364, 6366 (Feb. 9, 2010). Thus,
10 the variance policy shifts the burden and cost of complying with NEPA and ESA from the Corps
11 to state and local agencies. Comments cover letter at 3.

12 On April 15, 2010, DFG and the California Department of Water Resources ("DWR")
13 submitted joint comments to the Corps on its vegetation removal and variance policies. *See supra*
14 note 1. In their comments, these state agencies expressed their concerns about the Corps' major
15 departure from its prior vegetation and variance policies in both process and substance.
16 Comments' cover letter at 1. Importantly, the state agencies advised the Corps that the new
17 policies would have significant adverse effects on the environment by removing the last five
18 percent of the remaining riparian forest in the Central Valley. Central Valley levees and their
19 trees and shrubs provide critical habitat to fish and wildlife resources, including threatened and
20 endangered species such as the delta smelt, Valley elderberry longhorn beetle, Central Valley
21 spring-run Chinook salmon, long-fin smelt, giant garter snake, riparian brush rabbit, Swainson's
22 hawk and others. Comments at 32. The removal of this vegetation, as required by the vegetation
23 removal policy, would remove the last of these species' habitat. Comments at 32. Additionally,
24 the state agencies informed the Corps that it had a legal duty to comply with NEPA and the ESA,
25 and it failed to do so. *See* Comments' cover letter at 2-3.

26 DFG and DWR's comments also expressed on-going concerns for levee integrity if the
27 trees and shrubs were to be removed. The state agencies pointed out that the Corps failed to
28 consider that levee vegetation in California's Central Valley provides levee stability by

1 preventing soil erosion. And wholesale removal of vegetation from Central Valley levees leads to
2 other negative effects on levee integrity such as overtopping, accelerated erosion and seepage.
3 Comments' cover letter at 2.

4 On December 30, 2010, the Corps responded in some measure to the state agencies,
5 ("Letter")⁵ The Corps stated that removing vegetation from levees as provided for in ETL No.
6 1110-2-571 is "among the suite of design criteria that is used to ensure reliability, resilience and
7 operability of levee, floodwall, and dam projects nationwide." Letter at 1. And that until or
8 unless information becomes available, warranting a change in policy ETL No. 1110-2-571,
9 remains in effect. Letter at 1. In addressing the variance policy, the Corps did not alter the terms
10 of the policy but did agree to keep lines of communication open. Letter at 2. In other words, the
11 Corps responded that its national one-size-fits-all vegetation removal policy and the requirements
12 of the "draft" variance policy in the PGL, are currently in effect and the entities responsible for
13 California's levee system are required to abide by it.

14 **ARGUMENT**

15 Rule 24(a)(2) of the Federal Rules of Civil Procedure, provides that, upon timely motion,
16 an applicant is entitled to intervene in pending litigation as a matter of right (mandatory
17 intervention) where the applicant "claims an interest relating to the property or transaction that is
18 the subject of the action, and is so situated that disposing of the action may as a practical matter
19 impair or impede the movant's ability to protect its interest, unless existing parties adequately
20 represent that interest." When considering whether to grant intervention, "[c]ourts are to take all
21 well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or
22 answer in intervention, and declarations supporting the motion as true absent sham, frivolity or
23 other objections." (*Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th
24 Cir. 2001).)

25 The facts alleged above in DFG's proposed complaint-in-intervention demonstrate that
26 DFG has a right to intervene in this litigation as a matter of right. Given the mandates of both

27 ⁵ See Plaintiff-Intervenor, Exhibit 3 is a true and correct copy of Corps' letter of 12-30-
28 10.

1 ETL No. 1110-2-571 and the PGL, the threat of vegetation removal and habitat destruction in
2 California exists. Yet the Corps did not comply with either NEPA or the ESA prior to enforcing
3 its policies. Accordingly, DFG has legally protectable interests that could be impaired or
4 impeded by the outcome of this litigation, and the private Plaintiffs cannot adequately represent
5 those sovereign interests.

6 **I. DFG SATISFIES THE CRITERIA FOR INTERVENTION AS A MATTER OF RIGHT.**

7 The courts apply a four-part test when determining whether to grant intervention as a matter
8 of right. Specifically, the courts consider:

- 9 (1) the timeliness of the application for intervention;
- 10 (2) whether the applicant has a legally protectable or “significantly protectable” interest
11 relating to the property or transaction that is the subject of the litigation;
- 12 (3) whether the applicant is so situated that the disposition of the litigation may, as a
13 practical matter, impair or impede the applicant’s ability to protect that interest; and,
- 14 (4) the ability of existing parties to adequately represent the applicant’s interest.

15 *Southwest Center for Biological Diversity, supra*, 268 F.3d at 817-818, citing *Northwest Forest*
16 *Resources Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996).

17 In general, the courts “construe Rule 24(a) liberally in favor of potential intervenors.” *Id.* at
18 818.

19 **A. DFG’s Application for Intervention is Timely.**

20 In determining whether an application for intervention is timely, the courts consider the
21 stage of the litigation at the time is made, whether allowing intervention would result in undue
22 delay or prejudice to the existing parties, and the reason for any delay in seeking intervention.
23 *County of Orange v. Air California*, 799 F.2d 535, 536 (9th Cir. 1986), *cert. denied*, 48 U.S. 946
24 (1987). Taking all these factors into consideration, DFG’s application is timely.

25 **1. The Litigation is In Its Early Stages.**

26 Whether a motion for intervention is timely depends on the circumstances of each case.
27 Courts have held that motions for intervention as of right are timely in a number of
28 circumstances. *United States of America v. John C. Carpenter et al.*, 298 F.3d 1122, 1124 (9th

1 Cir. 2002) (motion to intervene as of right was timely after settlement agreement was made
2 public, even though suit was pending for over 18 months); *Northwest Forest Resource Council v.*
3 *Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (motion to intervene as of right was timely as it was
4 filed before the court made any substantive rulings); *Yniguez et al. v. Mofford et al.*, 939 F.2d
5 727, 734-735 (9th Cir. 1991), (motion to intervene as of right was timely even though it was filed
6 post-judgment when filed within the time allowed the filing of an appeal). Given the
7 circumstances of the case at bar, DFG's motion to intervene is timely.

8 This matter is still in its inception. The complaint for declaratory and injunctive relief was
9 filed on June 20, 2011, with the executed summons returned on July 19, 2011. The Defendants
10 did not make an appearance on the record until August 24, 2011. Plaintiffs filed a motion for
11 summary judgment on July 27, 2011 and filed an amended complaint on October 10, 2011 and
12 the Defendants filed a motion to dismiss on October 24, 2011.

13 At the request of the Defendants, briefing on Plaintiffs' motion for summary judgment was
14 stayed to allow Defendants' motion to dismiss to proceed first. The hearing date on Defendants'
15 motion to dismiss is December 7, 2011. Plaintiffs' opposition to the motion to dismiss is due on
16 November 23, 2011.⁶

17 Given that DFG's motion is being filed within three weeks after the Corps filed its motion
18 to dismiss and within one month after the filing of the Plaintiffs' first amended complaint, the
19 motion is timely.

20 **2. DFG's Motion Will Not Result in Undue Delay or Prejudice the**
21 **Current Parties.**

22 In determining whether undue delay or prejudice exists, the courts consider the delay in
23 moving to intervene, not whether allowing the intervention itself will delay the litigation as, ". . .
24 its admission as a party will have the inevitable effect of prolonging the litigation to some
25 degree." *Smith et al. v. Marsh et al.*, 194 F.3d 1045, 1051 (9th Cir. 1999), citations omitted. As

26 _____
27 ⁶ Information regarding the status of the case is taken from the Civil Docket for Case
28 Number: 2:1-cv-01650-JAM-JFM for the U.S. District Court Eastern District of California – Live
System (Sacramento).

1 explained below, DFG's motion for intervention, in and of itself, will not create any undue delay.
2 Additionally, should DFG's motion for intervention be granted, any resulting delay and thus
3 prejudice to the current parties will be minimal.

4 DFG's motion for intervention is calendared for the same day as the Corps' motion to
5 dismiss, thus all the current parties are already scheduled to be in court. The Corps' opposition, if
6 any, to DFG's motion is due on November 23, 2011, the same day that the Plaintiffs' opposition
7 to the Corps' motion to dismiss is to be filed. Should DFG's motion to intervene be granted, any
8 delay is minimal.

9 Nor does DFG's motion for intervention prejudice the Corps. At most the current litigation
10 will only be extended long enough to accommodate DFG's participation in opposing the Corps'
11 motion to dismiss. Since there is no injunction in place preventing the Corps from continuing the
12 implementation of ETL No. 1110-2-571, a slight delay in this early stage of the litigation does not
13 prejudice the Corps.

14 **3. DFG Filed Its Motion for Intervention Within a Reasonable Time,**
15 **After Evaluating Its Options and Viewing the Corps' Motion to**
16 **Dismiss, Which Highlights the Need for DFG to Protect Its Interests.**

17 In evaluating whether a motion to intervene is timely, courts will examine the reason for
18 any delay. The courts will often look to when the proposed intervenor first became aware that its
19 interest may be adversely affected and not adequately protected by the existing parties. *League of*
20 *United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997) (motion to
21 intervene denied when made twenty seven months after litigation began and would be intervenors
22 failed to adequately explain the reason for lengthy delay). Here, as discussed above, less than
23 five months have passed since the filing of the initial complaint, not a lengthy time period.
24 Additionally, DFG has valid reasons for this minimal delay.

25 DFG was aware of the current litigation since its inception and has been evaluating its
26 options, including seeking party status in the current matter. Joining in litigation where the Corps
27 is the defendant is not a decision made lightly. By participating in the California Levee
28 Roundtable, a multi-agency forum consisting of local, state, and federal entities including the
Corps, FWS and DWR, DFG sought to address its concerns without litigation. All avenues of

1 resolving disputes must be evaluated. DFG has been doing just that and concluded that seeking
2 party status in the current litigation is necessary to protect its interests.

3 Additionally, once DFG reviewed the Corps' recently filed motion to dismiss, the need to
4 seek party status was highlighted. For example, as alleged above and in DFG's complaint-in-
5 intervention, ETL No. 1110-2-571 is a final agency action that is currently being implemented.
6 Plaintiff-Intervenor's Complaint-in-Intervention, at ¶¶ 43-49. In its motion to dismiss, the Corps
7 claims that ETL No. 1110-2-571 is not final, is not being implemented and is not a regulation, but
8 merely a guideline. Corps' motion to dismiss at 10. Also, the Corps claims that the Central
9 Valley levees are exempt from ETL 1110-2-571 until July of 2012. Corps' motion to dismiss at
10 18. Again as stated in DFG's complaint-in-intervention, this is not the Corps' position "on the
11 ground."

12 Because it is important to DFG that it can be heard by the Court on the real threats to the
13 environment posed by the Corps policies, and to participate in the current litigation, DFG must
14 seek party status. Minimal time has passed prior to DFG's seeking party status. DFG utilized
15 this time to fully evaluate the best options to protect its interests, including seeking to intervene in
16 this action.

17 **B. DFG Has Significant Protectable Interests in the Corps' Vegetation**
18 **Removal Policy As DFG Is Mandated to Protect California's Wildlife and**
Fisheries.

19 The second showing required for mandatory intervention is of a legally protectable, or
20 "significant protectable" interest that is related to the property or transaction that is the subject of
21 the litigation.

22 An applicant will be found to have a "significant protectable" interest when "the injunctive
23 relief sought by the plaintiffs will have direct, immediate, and harmful effects upon a third party's
24 legally protectable interests." *Southwest Center for Biodiversity, supra*, 268 F.3d at 818, quoting
25 *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1494 (9th Cir. 1995).
26 The interest test is a practical, threshold test, with the goal of involving as many concerned
27 persons as is compatible with efficiency and due process. No specific legal or equitable interest is
28

1 required. *Citizens for Balanced Use v. Montana Wilderness Association et al.*, 647 F.3d 893, 898
2 (9th Cir. 2011); *Southwest Center for Biodiversity, supra*, 268 F.3d at 818.

3 An applicant who demonstrates first, an interest that is protected under some law, and
4 second, a relationship between its interest and the subject of the litigation, will be found to have a
5 “significant, protectable interest.” *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).
6 DFG has significant protectable interests in the current litigation, all of which will be affected by
7 the resolution of this action.

8 DFG has a direct interest in the present case. It is virtually undisputed that levee vegetation
9 has both direct and indirect impacts on California’s fish and wildlife resources. ETL at 2-1, 5-1;
10 Comments at 12. As such, DFG has an interest in the Corps’ policy requiring removal of that
11 vegetation because it has the statutory mandate to protect and conserve fish and wildlife. As
12 described above, the Corps’ vegetation removal policy poses real threats of removal of habitat for
13 various aquatic and terrestrial species – some threatened and endangered. Therefore, DFG as the
14 primary California agency charged with protecting and conserving California’s fish and wildlife
15 resources, DFG has a strong interest in assuring the Corps complies with the necessary
16 environmental federal laws prior to enforcing its policy.

17 **C. Disposition of the Litigation May, As a Practical Matter, Impair or Impede**
18 **DFG’s Ability to Protect Its Interests.**

19 The third requirement for intervention as a matter of right is whether the applicant’s
20 interests would, as a practical matter be impaired or impeded by the outcome of the litigation.
21 This requirement is satisfied upon a showing that the applicant “would be substantially affected in
22 a practical sense by the determination made in an action.” (*Southwest Center for Biodiversity,*
23 *supra*, 268 F.3d at 822, quoting Fed. R., Civ. P. 24 advisory committee’s notes.)

24 In this case, Plaintiffs seek injunctive and declaratory relief directing the Corps to comply
25 with both NEPA and ESA. Should Plaintiff’s request for relief be denied, DFG will be adversely
26 affected. The Corps could continue with the implementation of ETL No. 1110-2-571 without
27 complying with NEPA and ESA. DFG has an interest in making its case that the Corps should
28 comply with NEPA and ESA before it implements its vegetation removal policy at the state and

1 national level. Compliance with the necessary federal environmental laws would compel the
2 Corps to evaluate the significant and cumulative impacts its vegetation removal policy has on fish
3 and wildlife resources, and to identify mitigation measures and ways to avoid jeopardy to listed
4 species. Before California's remaining five percent of riparian habitat is removed from the
5 Central Valley, the Corps needs to determine whether the vegetation removal policy would harm
6 fish and wildlife resources or jeopardize the continued existence of listed species. The Corps has
7 not done this, yet has begun implementing the vegetation removal policy.

8 Should this Court deny the Plaintiffs' request for injunctive and declaratory relief without
9 allowing DFG to intervene as a matter of right, DFG's sovereign interests in protecting
10 California's fish and wildlife resources, including threatened and endangered species, would be
11 harmed.

12 **D. DFG's Interests Are Not Adequately Represented by the Existing Plaintiffs.**

13 The last prong of the four-part test for determining whether intervention as a matter of right
14 should be granted is whether the applicant's interest are adequately represented by the existing
15 parties to the action. Courts examine the following factors when assessing the adequacy of
16 representation: 1) whether the existing parties will undoubtedly make all of the applicant's
17 arguments; 2) whether the existing parties are capable of and willing to make the applicant's
18 arguments; and 3) whether the applicant offers a necessary element to the proceedings that
19 otherwise would be neglected. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir.
20 1983). If an applicant for intervention and an existing party have the same ultimate objective, a
21 presumption of adequate representation exists. *League of United Latin American Citizens et al. v.*
22 *Wilson et al.*, 131 F.3d 1297, 1305 (9th Cir. 1997), (citations omitted).

23 However, this is a rebuttable presumption. "[T]he requirement of inadequacy of
24 representation is satisfied if the applicant shows that representation of its interests 'maybe'
25 inadequate . . . [T]he burden of making this showing is minimal." *Sagebrush Rebellion, Inc.*,
26 *supra*, 713 F.2d at 258 citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972), n. 10.

27 The Plaintiffs cannot adequately represent DFG's interests. It is unknown what substantive
28 legal arguments the private Plaintiffs will make, and even if Plaintiffs were willing to make all of

1 DFG's arguments, they are not in a position to do so. This is because the Plaintiffs are all non-
2 profit environmental organizations, who do not have the sovereign perspective or statutory
3 mandate to protect California's fish and wildlife resources as DFG does. Accordingly, DFG
4 meets its minimal burden of showing that the Plaintiffs do not adequately represent DFG's
5 interests.

6 **1. As it is Unknown What Arguments the Plaintiffs Will Make, It is**
7 **Unknown If Plaintiffs Will Make DFG's Arguments.**

8 All Plaintiffs are non-profit organizations, with general goals of species and habitat
9 protection. Friends of the River is a California non-profit organization, Defenders of Wildlife is a
10 national non-profit organization and Center for Biological Diversity is a non-profit organization
11 with offices in the western states and Washington D.C. Am. Complaint at ¶¶ 6, 7, & 8.⁷ All three
12 organizations brought the instant litigation on behalf of themselves and their adversely affected
13 staffs and members. Am. Complaint at ¶ 9.

14 While one can surmise some of the Plaintiffs' arguments from their motion for summary
15 judgment that was filed with this Court on July 27, 2011, as the case at bar progresses, it is not
16 known at this time how the Plaintiffs will ultimately argue the case. DFG, on the other hand, has
17 different, sovereign interests it wishes to protect, and those differences could lead to different
18 arguments.

19 **2. The Plaintiffs Do Not Represent DFG's Interests As DFG is a State**
20 **Agency Charged With Implementing and Enforcing California Law**
21 **and Protecting the Public Trust Resources It Holds on Behalf of the**
22 **Public.**

23 As noted above, the Plaintiffs consist of three non-profit environmental agencies, with
24 general goals of species and habitat protection and compliance with federal laws. While DFG is
25 also concerned about the Corps' compliance with federal environmental laws, DFG' mission to
26 protect resources is sovereign-based and statutorily mandated; thus its interest in assuring the
27 Corps complies with the necessary laws is much broader than the Plaintiffs'.

28 ⁷ Plaintiffs' First Amended Complaint shall be referred to as "Am. Complaint."

1 As an initial matter, while there is a presumption in the law that a private citizen's interests
2 can be protected by a governmental party, there is no presumption that a governmental agency's
3 interests can be protected by private plaintiffs. *See e.g., Forest Conservation Council v. United*
4 *States Forest Service, supra*, 66 F.3d at 1498-99 (presumption of adequate representation is
5 present when the current party is a governmental body or officer charged by law with
6 representing the interests of the absentee), *State of California ex rel. Bill Lockyer as Attorney*
7 *General, et al. v. United States of America et al.*, 450 F.3d 436, 443-444 (9th Cir. 2006) (an
8 assumption of adequacy exists when the government is acting on behalf of its constituency) and,
9 *United v. Carpenter, supra*, 298 F.3d at 1122 (two environmental organizations allowed to
10 intervene more than eighteen months after case began when it was evident that the government
11 was no longer representing their interests). Thus here, there is no presumption that the Plaintiffs
12 can adequately protect DFG's interests.

13 Critically, DFG as California's trustee of fish and wildlife is charged with the broad
14 mandate by California's legislature to protect, conserve and manage California's fish and wildlife
15 resources. Cal. Fish & Game Code §§ 711.7(a), 1802. This mandate includes implementation
16 and enforcement of applicable California law for the benefit of all California citizens, not just
17 non-profit environmental groups. While the Plaintiffs may be focused solely on the preservation
18 of fish, wildlife and habitat, their interests can vary depending on the mission of the particular
19 organization, funding sources, and a number of other considerations.

20 In contrast, in addition to its statutory mandates described above, DFG can bring actions to
21 bring claims for recover natural resource damages. *See, e.g., California v. S.S. Bournemouth*, 307
22 F.Supp. 922, 929 (C.D.Cal. 1969) (California Department of Fish and Game, as the agency
23 charged with protection of the resources, may bring common law action against vessel for
24 compensatory damages for injuries to water and marine life resulting from an oil spill); *Alaska*
25 *Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) (state governments may act
26 in parens patriae capacity to sue for damage for injury to a sovereign interest; a state has a
27 sovereign interest in natural resources within its boundaries). As such, DFG's perspective is
28 sovereign-based and much broader than the Plaintiffs.

1 Finally, it is common knowledge that non-profit environmental groups and DFG can be at
2 odds regarding the implementation and enforcement of California law. *Center for Biological*
3 *Diversity v. California Fish and Game Commission*, 195 Cal.App.4th 128 (2011) (action for
4 attorney fees when Fish and Game Commission denied environmental organization's petition to
5 list the American Pika pursuant to the CESA; Fish and Game Commission relied in part, on
6 report from DFG in support of its decision); *Environmental Council of Sacramento et al. v. City*
7 *of Sacramento et al.*, 142 Cal.App.4th 1018 (2006) (action by various non-profit environmental
8 groups challenging environmental impact report and the issuance of incidental take permits by
9 DFG in connection with the habitat conservation plan for area inhabited by threatened giant garter
10 snake and Swainson's hawk). While at this time it would appear that the Plaintiffs and DFG have
11 similar interests, this could change over the course of the litigation. Differences in interests could
12 occur during briefing on the merits or in any settlement process. During the litigation, the current
13 Plaintiffs only have to consider their singular mission; while DFG must consider its much broader
14 mandates.

15 CONCLUSION

16 DFG satisfies all four requirements for mandatory intervention set forth in Rule 24(a)(2).
17 DFG's motion to intervene is timely, DFG has significant, legally protectable interests directly
18 related to the Corps' vegetation removal and variance policies, DFG's interests may, as a
19 practicable matter, be impaired or impeded by the outcome of this litigation, and the Plaintiffs
20 cannot adequately represent the state agencies' interests. Therefore, DFG respectfully requests
21 the court to grant it leave to intervene as a matter of right.

22 Dated: November 9, 2011

Respectfully Submitted,

23 KAMALA D. HARRIS
24 Attorney General of California
25 SARA J. RUSSELL
Supervising Deputy Attorney General

26 s/ DEBORAH L. BARNES

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CERTIFICATE OF SERVICE

Case Name: Friends of the River v. US Army No. 2:11-cv-01650-JAM-JFM
Corps of Engineers

I hereby certify that on November 9, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

CALIFORNIA DEPARTMENT OF FISH AND GAME'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFF-INTERVENOR

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 9, 2011, at Sacramento, California.

Linda Thorpe
Declarant

/s/ Linda Thorpe
Signature