

1
2 UNITED STATES DISTRICT COURT
3 FOR THE EASTERN DISTRICT OF CALIFORNIA
4

5 SAN JOAQUIN RIVER GROUP
6 AUTHORITY,

7 Plaintiff,

8 v.

9 NATIONAL MARINE FISHERIES
SERVICE,

10 Defendants.

1:11-cv-00725 OWW GSA

MEMORANDUM DECISION RE CENTRAL
DELTA WATER AGENCY, ET AL.'S
MOTION TO INTERVENE (Doc. 27)

11 I. INTRODUCTION/BACKGROUND

12 This suit arises from the United States Pacific Fisheries
13 Management Council's ("PFMC") April 13, 2011 adoption of
14 commercial troll and recreational fishing management measures for
15 the waters south of Cape Falcon, permitting commercial and
16 recreational fishing for Sacramento River fall-run Chinook Salmon
17 ("SRFC") for the 2011 fishing season ("2011 management
18 measures"), and the National Marine Fisheries Service's ("NMFS")
19 May 4, 2011 approval of the PFMCs recommended 2011 fishing
20 regulations. Doc. 1.
21

22 Central Delta Water Agency, South Delta Water Agency, Honker
23 Cut Marine, Inc., Rudy Mussi, and Roubert Souza (collectively
24 "Applicants") move for leave to intervene in this case as of
25 right pursuant to Federal Rule of Civil Procedure 24(a), or in
26 the alternative to permissively intervene under Rule 24(b). Doc.
27
28

1 19, filed June 10, 2010. Federal Defendants take no position on
2 the motion, provided the intervention will not affect the page
3 limits available to Federal Defendants for any briefing in this
4 matter. Doc. 29. Plaintiff opposes. Doc. 30. Applicants
5 replied. Doc. 43.
6

7 II. BACKGROUND

8 A. Claims in this Case.

9 Plaintiff, a coalition of irrigation districts holding water
10 rights in the San Joaquin River or one of its tributaries, assert
11 that Federal Defendants' adoption of the 2011 management measures
12 violates the Administrative Procedure Act ("APA"), Magnuson-
13 Stevens Fishery Conservation and Management Act ("Magnuson Act"),
14 and National Environmental Policy Act ("NEPA"), by among other
15 things approving "high levels" of Sacramento River Fall Run
16 Chinook salmon harvest, even though "overfishing" concerns
17 allegedly continue relative to the abundance of the species. *Id.*
18
19

20 B. The Applicants.

21 1. Central Delta Water Agency.

22 The Central Delta Water Agency ("Central Delta") is a
23 political subdivision of the State of California, created by the
24 California Legislature in 1973. *Mussi Decl.*, Doc. 27-5, ¶ 18.
25 Central Delta's territory includes approximately 125,000 acres of
26 land and associated waterways located entirely within the
27 boundaries of the Delta, as defined by Section 12220 of the
28

1 California Water Code, in the County of San Joaquin. Although
2 Central Delta's lands are devoted primarily to agriculture, its
3 lands have other uses, including for commercial, navigation,
4 transportation, residential, recreational, and habitat purposes.
5 *Id.* ¶ 21.

6
7 A Central Delta Director and Co-Plaintiff, Rudy Mussi,
8 explains that that Central Delta has a long-standing interest in
9 Delta water quality because "[g]ood quality water is necessary
10 for all of the uses of the waters within the Delta including
11 farming, recreation, and wildlife use." Mussi Decl., 27-5, ¶ 28.

12
13 2. South Delta Water Agency.

14 Like Central Delta, South Delta is a political subdivision
15 of the State of California, created by the Legislature in 1973.
16 Robinson Decl., Doc. 27-3, ¶ 19. South Delta includes
17 approximately 148,000 acres of land and associated waterways
18 located entirely within the boundaries of the Delta, in the
19 County of San Joaquin. *Id.* South Delta's lands are also
20 principally devoted to agriculture, but other uses include
21 commercial, navigation, transportation, residential,
22 recreational, and habitat purposes. South Delta is also
23 empowered to undertake "any lawful act necessary in order that a
24 sufficient in-channel water supply of suitable quality may be
25 available for any present or future beneficial use or uses of the
26 lands within the agency." Cal. Water Code App. §§ 116-4.1, 116-
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28

1 4.2 (b) .

2
3 3. Honker Cut Marine, Inc.

4 Honker Cut Marine, Inc. ("Honker Cut"), is a California
5 Corporation, owned and operated since 1986 as a marine business
6 on King Island in San Joaquin County, on Honker Cut (a Delta
7 waterway). Karnofel Decl., Doc. 27-4, ¶¶ 3-4. Honker Cut owns
8 the real property on which it operates, which is situated on
9 Honker Cut. *Id.* ¶ 3. The business sells, services, stores,
10 maintains, and launches boats used in the Delta for, among other
11 things, recreational fishing. *Id.* ¶¶ 4, 7.

12
13 4. Robert Souza, Sr.

14 Robert Souza, Sr. is an avid angler residing in Stockton,
15 California. Souza Decl., Doc. 27-6, ¶¶ 1, 4-5. He regularly
16 visits the Delta to fish for striped bass. *Id.* ¶ 6. Mr. Souza
17 is keenly interested in the conservation of striped bass in the
18 Delta, for educational, moral, spiritual, aesthetic, and
19 recreational reasons, and asserts the belief that "it is
20 unethical to kill salmon, steelhead, and striped bass in the
21 Delta." *Id.* ¶¶ 6.

22
23 Mr. Souza characterizes his interest in this litigation as
24 follows:

25
26 The plaintiff's lawsuit claims that its "member
27 agencies are injured by the failure" to comply with
28 Magnuson-Stevens "because their water rights, water
supply and water supply facilities and all of its
electrical generation, recreation, and flood control
facilities depend on or are located on the San Joaquin

1 River and its tributaries, which is occupied by"
2 Sacramento River fall-run Chinook salmon, and "[a]s
3 holders of the major non-federal and non-State water
4 rights in the San Joaquin River basin, SJRGA member
5 agencies are responsible for abundance of" Sacramento
6 River fall-run Chinook salmon. Complaint for
7 Declaratory Relief and Injunctive Relief, para. 16-17.
8 SJRGA's member agencies claim water rights upstream of
9 the Delta, and their use and exercise of their alleged
rights impacts Delta water quality. If SJRGA's member
agencies in fact claim that they have a responsibility
for Sacramento River fall-run Chinook salmon and that
their water use operations are influenced by the
abundance of such salmon, than [sic] Delta water
quality is also influenced by the abundance of such
salmon, and I personally am interested in SRFC
abundance.

10 Id. ¶ 17.

11 5. Rudy Mussi.

12 Rudy Mussi is a director of Central Delta Water Agency and a
13 farmer within Central Delta. Mussi Decl. ¶1. He has lived his
14 entire life in the Delta and depends on the San Joaquin River for
15 water used on his farm. *Id.* ¶6. He and his family also use the
16 Delta for recreational purposes, including fishing. *Id.* at ¶7.
17 Mr. Mussi has a long-standing and deeply-held personal interest
18 in the conservation of the Delta and its species. *Id.* at ¶¶ 8-
19 10.

21 As a director of Central Delta for the past 19 years, he has
22 spent "countless hours of his own time working on a multitude of
23 issues relating to the health of the Delta ecosystem," and
24 professes to "experience great happiness with the understanding I
25 am working toward a healthy Delta that will support all fish and
26 wildlife species, including salmon, steelhead, striped bass,
27 black bass, and delta smelt, as well as birds and other
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1 wildlife." *Id.* ¶¶ 11-12. Mr. Mussi states that "[t]he
2 precipitous declines in all fish populations in past decades
3 indicate the overall poor health of the Delta due to the effects
4 that the state and federal pumps have on the ecosystem." *Id.* at
5 ¶ 16.
6

7 III. INTERVENTION AS OF RIGHT.

8 Applicants move to intervene as of right or, in the
9 alternative, to permissively intervene.
10

11 A. Intervention as of Right.

12 1. Legal Standard.

13 Intervention is governed by Federal Rule of Civil Procedure
14 24. To intervene as a matter of right under Rule 24(a)(2), an
15 applicant must claim an interest, the protection of which may, as
16 a practical matter, be impaired or impeded if the lawsuit
17 proceeds without the applicant. *Forest Conservation Council v.*
18 *U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1993). The Ninth
19 Circuit applies Rule 24(a) liberally, in favor of intervention,
20 and requires a district court to "take all well-pleaded, non-
21 conclusory allegations in the motion as true absent sham,
22 frivolity or other objections." *S.W. Ctr. for Biological*
23 *Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). A four-
24 part test is used to evaluate a motion for intervention of right:
25

26 (1) the motion must be timely;

27 (2) the applicant must claim a "significantly
28 protectable" interest relating to the property or

1 transaction which is the subject of the action;

2 (3) the applicant must be so situated that the
3 disposition of the action may as a practical matter
4 impair or impede its ability to protect that interest;
and

5 (4) the applicant's interest must be inadequately
6 represented by the parties to the action.

7 *Forest Conservation Council*, 66 F.3d at 1493.

8 2. Timeliness.

9 In assessing timeliness, courts in the Ninth Circuit must
10 consider: (1) the current stage of the proceedings; (2) whether
11 the existing parties would be prejudiced; and (3) the reason for
12 any delay in moving to intervene. *League of United Latin Am.*
13 *Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997).

14 Applicants moved to intervene on June 10, 2010, Doc. 27, after
15 providing notice of their intent to do so no later than June 6,
16 2010, see Doc. 24, which is approximately 30 days after the
17 filing of the Complaint. Existing parties are not prejudiced
18 when "the motion was filed before the district court made any
19 substantive rulings." *N.W. Forest Resource Council v. Glickman*,
20 82 F.3d 825, 837 (9th Cir. 1996). Here, no substantive rulings
21 have been made in this case, no scheduling conference has been
22 held, and no discovery has commenced. The only judicial action
23 taken in the case was the setting of a briefing and hearing
24 schedule for the parties' cross dispositive motions.

25
26 Plaintiff nonetheless contends that the intervention is
27 untimely because of the expedited briefing schedule on cross-
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1 motions for summary judgment, which is not atypical in Magnuson
2 Act cases. Plaintiff cites *Southern Offshore Fishing Association*
3 *v. Daley*, 995 F. Supp. 1411, 1424-25 (M.D. Fla. 1998)¹, which
4 denied intervention by a coalition of environmental
5 organizations. The complaint in that case was filed May 2, 1997;
6 the schedule required completion of briefing on cross-motions for
7 summary judgment by early September 1997; and the administrative
8 record was filed June 16, 1997. The intervention petition, filed
9 July 16, 1997, more than two months after the complaint was filed
10 and less than two months before briefing was to be completed, was
11 untimely in light of the case schedule. *Id.* Plaintiff fails to
12 mention, however, that the district court nonetheless permitted
13 the proposed intervenors to file *amici curiae* briefs on any issue
14 presented by the parties. *Id.*

17 The situation here is distinguishable. The petition for
18 intervention was filed slightly more than one month after the
19 filing of the initial complaint, and more than one month before
20 briefing on cross motions was set to commence on July 22, 2011.
21 That briefing will span a period of almost two months, with the
22 final reply brief due September 16, 2011. The motion to
23 intervene is timely.

24
25 3. Significant Protectable Interests.

26 To demonstrate a "significantly protectable interest," "a

27
28 ¹ Plaintiff's brief cites this as a "9th Cir. 1998" when it is actually a M.D. Fla. 1998 case.

1 prospective intervenor must establish that (1) the interest
2 asserted is protectable under some law, and (2) there is a
3 relationship between the legally protected interest and the
4 claims at issue." *Id.* Here, among other remedies, Plaintiff
5 seeks to enjoin SRFC commercial harvest, because, "[i]f
6 significant ocean harvest continues, it will blunt SRFC
7 preservation and restoration efforts, including those undertaken
8 by [Plaintiff]." Doc. 1 ¶¶ 188-91.

10
11 a. Central Delta and South Delta.

12 Plaintiff objects that Applicants Central Delta and South
13 Delta lack significant protectable interests because their
14 interests are "in the Delta," not the ocean. Doc. 30 at 3-4.
15 Applicants' assertion of a protectable interest is convoluted.
16 Rudi Mussi explains Central Delta's claim of interest in this
17 case:

18 The plaintiff's lawsuit claims that its "member
19 agencies are injured by the failure" to comply with
20 Magnuson-Stevens "because their water rights, water
21 supply and water supply facilities and all of its
22 electrical generation, recreation, and flood control
23 facilities depend on or are located on the San Joaquin
24 River and its tributaries, which is occupied by"
25 Sacramento River fall-run Chinook salmon and that "[a]s
26 holders of the major non-federal and non-State water
27 rights in the San Joaquin River basin, SJRGA member
28 agencies are responsible for abundance of" Sacramento
River fall-run Chinook salmon. Complaint for
Declaratory Relief and Injunctive Relief, para. 16-17.
SJRGA's member agencies claim water rights upstream of
the Delta, and their use and exercise of their alleged
rights impact Delta inflow and water quality. To the
extent SJRGA's member agencies in fact claim that they
have a responsibility for Sacramento River fall-run

1 Chinook salmon and that their water use operations are
2 influenced by the abundance of such salmon, the Delta
3 inflow and water quality is also influenced by the
4 abundance of such salmon.

5 *Id.* at ¶ 29. Central Delta appears to suggest that any changes
6 to the management of SRFC in the ocean environment that could
7 result from this lawsuit will not only affect the abundance of
8 salmon but may also "influence" freshwater management measures to
9 benefit salmon, which in turn will affect water quality in the
10 Delta.

11 Plaintiff argues that these asserted interests are not
12 related to this litigation:

13 The water quality and water supply interests raised by
14 the South Delta [] and Central Delta [] do not depend
15 on whether the 2011 management measures are sustained.
16 (Doc. 27-1.) While the Applicants state that "the fish
17 themselves are dependent on the same water supply and
18 water of sufficient quality to sustain them in the
19 Delta," they do not explain how the water supply or
20 water quality for lands within their respective
21 jurisdictions would be harmed if the 2011 management
22 measures were not sustained. Regardless of whether the
23 fish depend on the same water supply and water quality,
24 SDWA and CDWA would only have an interest in the
25 disposition of the 2011 management measures if their
26 water supply and water quality depended on the
27 abundance of Fall Chinook. Since this is not stated in
28 the Motion, they do not state an interest relating to
the present litigation.

Doc. 30 at 4 (emphasis added).

Applicants respond by pointing out that Plaintiff has
alleged a connection between the 2011 management measures and
freshwater operations. The Complaint alleges that "Section
3406(b)(1) of the Central Valley Project Improvement Act

1 ('CVPIA') (Public Law 102-575) directs the Secretary of the
2 Interior to develop and implement a program that makes all
3 reasonable efforts to at least double natural production of
4 anadromous fish in California's Central Valley streams on a long-
5 term, sustainable basis." Doc. 1 ¶ 173. SRFC are such a
6 species. In addition, water quality standards imposed by the
7 California State Water Resources Control Board ("SWRCB") include
8 a "'narrative salmon doubling objective,' which requires that
9 water quality conditions shall be maintained, together with other
10 measures in the watershed, sufficient to maintain a doubling of
11 natural production of Chinook salmon from the average production
12 of 1967-1991, consistent with the provisions of State and federal
13 law." *Id.* ¶ 174. The SWRCB has also imposed Sacramento and San
14 Joaquin River flow objectives to "provide attraction and
15 transport flows and suitable habitat for various life stages of
16 aquatic organisms, including Delta smelt and Chinook salmon. *Id.*
17 ¶ 15. The Complaint inferentially alleges that the increased
18 harvest may "require additional actions to double the natural
19 production of salmon than would have otherwise been required..."
20 *Id.* ¶ 177.² Such actions may impact flows in the Delta, which
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24
25 ² Applicants also argue that because "Applicants have claims to
26 the same waters as do SJRGA member agencies, Applicants interests
27 may be affected by determinations of SJRGA member agency rights."
28 Doc. 43 at 4. But, Applicants fail to explain what "rights" of
Plaintiff's are at issue in this case. That Plaintiff's members
are holders of water rights in the San Joaquin basin is
undisputed.

1 has the potential to impact proposed intervenors' interests.

2 Central Delta and South Delta have established that their
3 legally protectable interests are related to the claims in this
4 case.

5
6 b. Honker Cut.

7 Honker Cut's claimed interest is in the recreational value
8 of the SRFC fishery. Plaintiff argues that because Salmon
9 fishing in the San Joaquin River has been prohibited for many
10 years, is not permitted by the 2011 management measures, and
11 would not resume even if the 2011 management measures are
12 sustained, Honker Cut Marine has no legitimate interest in salmon
13 fishing in the San Joaquin River and the Delta. Doc. 30 at 5.
14 However, Applicants point out that fishing for salmon is
15 permitted in the lower Sacramento River. Doc. 43 at 7. The
16 claims in this case relate to SRFC abundance.
17

18
19 c. Mr. Souza.

20 Plaintiff complains that Applicants have not articulated any
21 interest Mr. Souza has in the present litigation. Plaintiff
22 points out that although Mr. Souza fly fishes, he does not fish
23 for Fall Chinook. But, Mr. Souza has articulated an aesthetic
24 interest in SRFC abundance and the fish themselves. Souza Decl.,
25 Doc. 27-6 at ¶ 5. This is a protected interest. *See Summers v.*
26 *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (acknowledging
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1 aesthetic interests as sufficient for purposes of standing in
2 environmental cases). The claims in this case relate to SRFC
3 abundance and therefore to Mr. Souza's aesthetic interest in that
4 species.

5
6 d. Mr. Mussi

7 Plaintiff also objects that Mr. Mussi has no protectable
8 interest in this case. Like Mr. Souza, he holds an aesthetic
9 interest in SRFC abundance. He also shares Central Delta and
10 South Delta's interest in water quality, as he uses Delta water
11 for his farming operations. These are protectable interests
12 related to the claims in this case.
13

14 4. Impairment of Interests.

15 The next inquiry is whether disposition of this action may,
16 as a practical matter, impair or impede Applicants' abilities to
17 protect their interests. This requirement demands only a showing
18 that the applicant "would be substantially affected in a
19 practical sense by the determination made in an action." *S.W.*
20 *Ctr.*, 268 F.3d at 822.
21

22 To the extent that Applicants are interested purely in SRFC
23 abundance for either commercial or aesthetic reasons, it is
24 unclear why these interests do not completely overlap with those
25 of the Plaintiff, SJRGA. The Complaint alleges that the 2011
26 management measures allow for too much salmon harvesting and
27 would result in too little salmon abundance and continued
28

1 overfishing. Applicants have failed to demonstrate how this
2 interest will be impaired in any practical sense by this lawsuit.

3 Those Applicants with concerns about water quality, namely
4 Central Delta, South Delta, and Mr. Mussi, hold interests that
5 may, at least according to the allegations of the Complaint, be
6 impaired in a practical sense by a determination in favor of
7 Plaintiff. As discussed above, the Complaint alleges that the
8 increased harvest may "require additional actions to double the
9 natural production of salmon than would have otherwise been
10 required...." *Id.* ¶ 177. Although the extent and nature of any
11 such "additional actions" is unclear, such actions may benefit
12 Applicants by enhancing water quality through the commitment of
13 additional Project water for fish restoration. Conversely, the
14 absence of such additional actions to double the natural
15 production of salmon would harm Applicants. Applicants'
16 interests in preserving and enhancing Delta water quality may be
17 impaired by this litigation.

20
21 5. Existing Parties' Ability to Represent Applicants'
22 Interests.

23 The remaining issue is whether Applicants' interests are
24 adequately protected by other defendants or defendant-
25 intervenors. In assessing the adequacy of representation, the
26 Ninth Circuit looks at three factors:

- 27 (1) whether the existing parties will undoubtedly make
28 all of the applicant's arguments;

1 (2) whether the existing parties are capable of and
2 willing to make the applicant's arguments; and

3 (3) whether the applicant offers a necessary element
4 to the proceedings that otherwise would be neglected.

5 *Id.* at 823. "[T]he requirement of inadequacy of representation
6 is satisfied if the applicant shows that representation of its
7 interests may be inadequate....[T]he burden of making this
8 showing is minimal." *Sagebrush Rebellion Inc. v. Watt*, 713 F.2d
9 525, 528 (9th Cir. 1983).

10 It is "well-settled precedent in this circuit" that "[w]here
11 an applicant for intervention and an existing party have the same
12 ultimate objective, a presumption of adequacy of representation
13 arises." *League of United Latin Am. Citizens*, 131 F.3d at 1305;
14 *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.
15 2003). This presumption is triggered here with respect to
16 Applicants' interest in SRFC abundance. The presumption is
17 rebuttable upon a showing that the applicant and the existing
18 parties "do not have sufficiently congruent interests." *S.W.*
19 *Ctr.*, 268 F.3d at 823. Applicants have provided no such
20 evidence.
21

22 As to Applicants' interest in water quality in the Delta, no
23 existing party has a sufficiently congruent interest. However,
24 the extent to which this interest will require separate briefing
25 in this litigation is minimal at best. This necessitates the
26 strictest of limits on Applicants' participation in the lawsuit.
27
28

1 B. Permissive Intervention.

2 With respect to Applicants' interest in SRFC abundance, for
3 which intervention of right is not appropriate, Applicants
4 alternatively request permissive intervention pursuant to Rule
5 24(b) (2), which requires:

6 (1) A timely application;

7
8 (2) A claim or defense sharing common questions of law or
9 fact with the main action;

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

12 See Fed. R. Civ. P. 24(b) (2).

13 It has already been determined that Applicants motion is
14 timely, and their concern for SRFC abundance overlaps directly
15 with the main action. However, Applicants have not demonstrated
16 how their interest in SRFC abundance is different from that of
17 Plaintiff, who has brought this lawsuit to stop ocean harvest of
18 SRFC. Permitting Applicants to intervene on an issue on which
19 they can offer no new perspectives will prejudice the existing
20 parties under the circumstances, where briefing has been
21 expedited. Applicants' are not entitled to permissively
22 intervene on this issue.
23
24

25 IV. CONCLUSION

26 Applicants' motion to intervene as a matter of right is
27 DENIED as to those Applicants whose sole interest is in SRFC
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1 abundance, as is their alternative request for permissive
2 intervention on this issue. The motion is GRANTED as to those
3 Applicants seeking to protect their interest in Delta water
4 quality.

5 Applicants' intervention is conditioned upon strictly
6 limiting their participation solely to issues about which they
7 can provide unique information and/or arguments. Applicants must
8 clearly delineate the issues related to their water quality
9 interest on which they intend to submit briefing. The parties
10 shall meet and confer in an effort to agree upon proposed
11 language describing limits for these issues, as well as related
12 page limits for any such briefing by intervenors, oppositions,
13 and replies. Proposed language shall be submitted on or before
14 July 8, 2011 at 12:00 noon. If the parties cannot agree on such
15 limiting language, any disagreements shall be described in a
16 joint statement to be filed with the court by the same deadline.

17 Applicant shall also submit a proposed form of order
18 consistent with this memorandum decision by July 8, 2011 at noon.
19 The issue and page limitation language will be incorporated in
20 the final order.

21 SO ORDERED
22 Dated: July 5, 2011

23
24
25 /s/ Oliver W. Wanger
26 United States District Judge
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28