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10 CALIFORNIA SEA URCHIN COMMISSION,  
11 PETER HALMAY, HARRY LIQUORNIK,  
12 CALIFORNIA ABALONE ASSOCIATION, AND  
13 SONOMA COUNTY ABALONE NETWORK

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA

15 THE OTTER PROJECT; ENVIRONMENTAL )  
16 DEFENSE CENTER, )  
17 Plaintiffs, )  
18 vs. )  
19 KEN SALAZAR, *et al.*, )  
20 Defendants. )

Case No: 5:09-cv-04610-JW

**(1) NOTICE OF MOTION AND MOTION OF CALIFORNIA SEA URCHIN COMMISSION, PETER HALMAY, HARRY LIQUORNIK, CALIFORNIA ABALONE ASSOCIATION, AND SONOMA COUNTY ABALONE NETWORK FOR LEAVE TO INTERVENE UNDER FRCP 24; AND (2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

[Filed Concurrently With:

- 1) Declaration of California Sea Urchin Commission;
- 2) Declaration of Peter Halmay;
- 3) Declaration of Harry Liquornik;
- 4) Declaration of California Abalone Association;
- 5) Declaration of Sonoma County Abalone Network;
- 6) [Proposed] Order; and
- 7) [Proposed] Answer in Intervention]

Hearing Date: March 8, 2010

Time: 9:00 a.m.

Courtroom: 8, 4<sup>th</sup> Floor

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1                    **NOTICE OF MOTION AND MOTION FOR LEAVE TO INTERVENE UNDER FRCP 24**

2                    **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3                    **PLEASE TAKE NOTICE** that the California Sea Urchin Commission (“CSUC”), Peter  
4 Halmay (“Halmay”), Harry Liquornik (“Liquornik”), California Abalone Association (“CAA”), and  
5 Sonoma County Abalone Network (“SCAN”) will and hereby move the Court for leave to intervene in  
6 this action. **NOTICE IS FURTHER GIVEN** that the CSUC, Halmay, Liquornik, CAA, and SCAN  
7 request the opportunity to be heard **on March 8, 2010, at 9:00 A.M., in Courtroom 8**, of the above-  
8 captioned Court, located at 280 South 1st Street, 4<sup>th</sup> Floor, San Jose, California 95113.

9  
10                    By this motion, brought pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, CSUC,  
11 Halmay, Liquornik, CAA, and SCAN (collectively “Proposed Intervenors”) seek a determination that  
12 they are entitled to intervene as a matter of right on the following grounds.

13                    1.        The motion is timely.

14                    2.        Proposed Intervenors have significant and protectable legal interests related to the subject  
15 of this litigation including economic interests as commercial fishermen and interests as intended  
16 beneficiaries of Public Law 99-625.

17  
18                    3.        The relief requested by Plaintiffs in their Complaint will, if granted, adversely affect  
19 Proposed Intervenors as it will result in the destruction of certain southern California shellfish fisheries  
20 and resources from which Proposed Intervenors derive their livelihood and otherwise have interests.

21                    4.        Defendants cannot adequately protect Proposed Intervenors’ interests because Defendants  
22 do not have proprietary interests at stake. By contrast, Proposed Intervenors seek to protect their  
23 livelihood and other interests by opposing Plaintiffs’ efforts to abolish the so-called “no otter  
24 management zone” that is vital to the continuation of the fisheries and the conservation of resources on  
25 which Proposed Intervenors depend. The government's broader interests differ from the interests of  
26 Proposed Intervenors.  
27  
28

1 Alternatively, Proposed Intervenors request permissive intervention pursuant to Rule 24(b) of the  
2 Federal Rules of Civil Procedure because their defense raises questions of law and fact common to  
3 Plaintiffs' claim, and intervention will not unduly delay or prejudice the resolution of this litigation.

4 This motion is based on this Notice of Motion and Motion for Leave to Intervene, the  
5 Memorandum of Points and Authorities, the Declarations of the CSUC, Halmay, Liquornik, CAA, and  
6 SCAN, the Proposed Answer in Intervention attached as Exhibit 1 to the Motion, the pleadings and  
7 papers on file herein, and upon such other matters as may be presented to the Court at or before the time  
8 of the hearing.  
9

10 Counsel for Proposed Intervenors has consulted with counsel for the existing parties regarding  
11 the Motion to Intervene. Counsel for Defendants asserts Defendants have no position on the Motion.  
12 Counsel for Plaintiffs asserts that Plaintiffs have no position on the Motion at this time but reserve the  
13 right to object pending review of the Motion and accompanying documents.  
14

15  
16 Dated: December 17, 2009

Respectfully submitted,

17  
18 NOSSAMAN LLP  
19 BENJAMIN Z. RUBIN  
20 GEORGE J. MANNINA, JR., *pro hac vice*

21 /s/  
22 Benjamin Z. Rubin

23 *Attorneys for Proposed Intervenor-Defendants*  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Public Law 99-625 (codified at 16 U.S.C. § 1536 Note) was enacted to further the dual goals of protecting the threatened California sea otter while safeguarding the commercial fishermen whose livelihood depends on the shellfish which sea otters prey upon. The latter goal has been effectuated via a “no sea otter management zone” in southern California south of Point Conception (the “Management Zone”) within which sea otters are to be relocated from urchin and other fisheries via non-lethal means. Plaintiffs seek to force the U.S. Fish and Wildlife Service (“FWS”), *inter alia*, to abolish the Management Zone, thereby allowing sea otters to permanently expand their range into areas where Proposed Intervenor Peter Halmay, Harry Liquornik, and members of Proposed Intervenor California Sea Urchin Commission (“CSUC”) and California Abalone Association (“CAA”) fish for sea urchins. Proposed Intervenor Sonoma County Abalone Network (“SCAN”) has a longstanding and established interest in abalone conservation.

Proposed Intervenor bring this motion to intervene as defendants to protect their longstanding livelihoods as commercial fishermen. As Plaintiffs themselves recognize, sea urchins and abalone are primary prey of sea otters. Complaint, ¶¶ 35, 36. Allowing sea otters to permanently expand their range into the Management Zone will likely end the existing sea urchin fishery and prevent the re-initiation of the abalone fishery because sea otters will wipe out the fishable sea urchin and abalone populations. Plaintiffs also recognize the Management Zone was created to protect shellfish fishermen because of concerns that sea otter range expansion into the Management Zone would threaten the fishermen’s economic livelihood. Complaint, ¶¶ 3, 51, 61. Indeed, there is an inverse relationship between sea otter and sea urchin population levels. *Id.*, ¶ 36. Furthermore, because sea otters are listed as a threatened species under the Endangered Species Act (“ESA”) and are also protected under the Marine Mammal Protection Act (“MMPA”), abolishing the Management Zone will subject Proposed Intervenor to new



1 regulation under the ESA and MMPA. In short, Plaintiffs’ lawsuit directly threatens Proposed  
2 Intervenor’s substantially protectable interests. Proposed Intervenor should be permitted to safeguard  
3 those interests by participating in this lawsuit.

## 4 **II. SUMMARY OF ARGUMENT**

5 Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that upon a timely motion, an  
6 applicant for intervention is entitled to intervene as of right where it “claims an interest relating to the  
7 property or transaction that is the subject of the action, and is so situated that disposing of the action may  
8 as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties  
9 adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). Proposed Intervenor satisfy the test for  
10 intervention as of right: (1) Proposed Intervenor’s motion is timely, (2) Proposed Intervenor have a  
11 direct, substantially protectable legal interest in the actions that will be taken if Plaintiffs prevail, (3) as a  
12 practical matter, Proposed Intervenor’s interests will be impaired if Plaintiffs prevail, and (4) none of the  
13 existing parties will adequately represent Proposed Intervenor’s interests. *See United States v. Alisal*  
14 *Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (setting forth the Ninth Circuit’s four-part test for  
15 intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2)).  
16  
17

## 18 **III. FACTUAL AND LEGAL BACKGROUND**

### 19 **A. Sea Otter/Fishery Interactions and P.L. 99-625**

20 In 1977, southern sea otters were listed as a threatened species under the ESA. Complaint, ¶ 40.  
21 Sea urchins and abalone are a primary prey of sea otters. *Id.*, ¶¶ 35, 36. To help the California sea otter  
22 population recover and to protect sea urchin and other fishermen from destructive competition by sea  
23 otters, Congress enacted Public Law 99-625 in November 1986. P.L. 99-625 authorizes the Secretary of  
24 the Interior (“Secretary”), acting through FWS, to establish a new colony of sea otters by relocating  
25 some otters to a new location away from the parent population (the “translocation zone”). P.L. 99-625  
26 also authorized the Secretary to establish a no otter Management Zone “to prevent, to the maximum  
27 extent feasible, conflict with other fishery resources within the management zone.... Any sea otter found  
28

1 within the management zone” was to be removed and returned to either the parent population or the  
2 translocation zone. P.L. 99-625, Section 1(b)(4).

3 Pursuant to P.L. 99-625, the Secretary designated a Management Zone south of Point  
4 Conception, California as an otter free zone and an area around San Nicolas Island as the otter relocation  
5 zone. 50 C.F.R. 17.84(d)(4)-(5)(i)-(ii). The Management Zone comprises the principal area of the  
6 southern California sea urchin fishery and is vital to the continued viability of this fishery. Between  
7 2003-2008, 85% of the statewide sea urchin landings were from the Management Zone. Declaration of  
8 California Sea Urchin Commission (“CSUC Dec.”), attached as Exhibit 2, ¶26. Eighty percent of those  
9 landings are from the Channel Islands, 28 miles from the northern boundary of the Management Zone at  
10 Point Conception. *Id.*, ¶ 27. Indeed, the Channel Islands are the heart of California’s sea urchin fishery,  
11 producing approximately 68% of the total harvest. *Id.*

12  
13 If the Management Zone is terminated, as Plaintiffs wish, the requirement to remove otters  
14 entering that zone will end.<sup>1</sup> Sea otters will likely establish populations throughout the Management  
15 Zone and reduce the fishable sea urchin and abalone populations to unsustainable levels, thus ending the  
16 California sea urchin fishery and preventing the reopening of the abalone fishery.

17  
18 A sea otter consumes 20%-30% of its weight each day. CSUC Dec., ¶ 58. When otters occupy  
19 an area, urchins are normally their first invertebrate prey species, followed by abalone. *Id.* An average  
20 male otter weighing 50 pounds will consume about 12.5 pounds of food daily (25% of its body weight).  
21 Because otters eat only parts of the urchin, it takes 178 pounds of whole sea urchin to provide 12.5  
22 pounds of food for a single sea otter, or up to 65,000 pounds of sea urchin annually. At this rate, it  
23 would take just 169 sea otters feeding exclusively on sea urchin to consume 11 million pounds of  
24

25  
26 \_\_\_\_\_  
27 <sup>1</sup> Regulations implementing P.L. 99-625 provide that if the Secretary declares the otter translocation  
28 program a failure, as Plaintiffs seek, the Secretary shall end that program and return translocated sea  
otter to the parent population. 50 C.F.R. 17.84(d)(8)(vi). The regulations also provide that if  
translocation is declared a failure, efforts to maintain the Management Zone will be curtailed, *i.e.*,  
stopped. *Id.*

1 urchins annually. *Id.*, ¶ 61; *see also* Declaration of Peter Halmay (“Halmay Dec.”), attached hereto as  
2 Exhibit 3, ¶ 28 and studies cited therein. The entire California sea urchin harvest (northern and  
3 southern) totals only 10-12 million pounds annually. CSUC Dec., ¶ 25.<sup>2</sup> In short, sea otter predation  
4 would take sea urchin populations below sustainable levels. *Id.*, ¶¶ 27, 62; Halmay Dec., ¶ 29. The  
5 same calculation applies regarding abalone consumption by otters. Assuming 60% of an otter’s diet is  
6 abalone (the favored prey when sea urchin population densities are low), then 50 average sized otters  
7 could consume 500 pounds of abalone each day, or 90 tons annually. Declaration of the California  
8 Abalone Association (“CAA Dec.”), attached hereto as Exhibit 4, ¶ 11. For comparison, in 1996, the  
9 last year the commercial abalone fishery was open, commercial abalone landings were 114.75 tons. *Id.*  
10

11 Scientists have concluded that shellfish harvests are not sustainable after otters enter and remain  
12 in an area. CSUC Dec., ¶¶ 62, 63, 73, 74 and studies cited therein. The U.S. Marine Mammal  
13 Commission has noted that the southward movement of otters into the Management Zone “will seriously  
14 affect all shellfish fisheries in California” and “the abandonment of the sea otter range management  
15 could, over the long term, lead to the elimination of virtually all of the shellfish fisheries along the West  
16 Coast; these fisheries have long been major economic and cultural assets over the entire region.” *Id.*,  
17 ¶ 74 *quoting* the Marine Mammal Commission.<sup>3</sup> *See also* CSUC Dec., ¶ 66 *quoting* scientific study  
18 concluding “sea otter range expansion will result in the loss of most recreational and commercial  
19  
20

---

21 <sup>2</sup> California regulations set a minimum size for urchin that can be harvested in order to ensure proper  
22 reproduction and population size. CSUC Dec., ¶¶ 32, 33; Halmay Dec. ¶ 26. Unfortunately, sea otter  
23 predation is not constrained by such size limits to prevent stock collapse.

24 <sup>3</sup> When sea otters began moving in and out of the Management Zone along the coast between Point  
25 Conception and Santa Barbara, the red sea urchin harvest dropped 90% within two years. Similarly,  
26 when sea otters entered the Port San Luis area, sea urchin densities dropped to 1% of their pre-otter  
27 density within 27 months. Halmay Dec., ¶ 33 and studies cited therein. Otters moving in and out of the  
28 Management Zone in the winters of 1997-1998 and 1998-1999, preying on urchins and abalone, reduced  
shellfish populations to levels that will not allow a commercial fishery in the area of the otter incursion.  
Declaration of Harry Liquornik (“Liquornik Dec.”), attached hereto as Exhibit 5, ¶ 6. Although  
relatively few otters were moved to San Nicolas Island as part of the translocation program, red abalone  
landings in that fishery area declined as a percentage of State landings from 41% in 1987, to 30% in  
1988, 12% in 1989, and 3% in 1990. CAA Dec., ¶ 14.

1 fisheries ...”; CAA Dec., ¶ 12-13 *quoting* scientific studies concluding “The documented loss of shellfish  
2 fisheries associated with sea otter reoccupation strongly suggests the pattern can be used to predict  
3 future losses whenever sea otter range expansion occurs.”

4 Historically, sea otters ranged throughout southern California. Complaint, ¶ 3. This range  
5 included the Management Zone. If the Management Zone is abolished, otters are expected to reoccupy  
6 the area. *Id.*, ¶¶ 2, 84, 100; section heading, p. 21, line 20. Plaintiffs’ expectation of the inevitability of  
7 sea otter range expansion is supported by scientific experts. CSUC Dec, ¶¶ 67-71 and studies cited  
8 therein; Halmay Dec., ¶ 30. Sea otter range expansion typically follows a pattern in which male otters  
9 begin migrating in and out of the new range, ultimately followed by females and pups, thereby  
10 permanently extending the range. *Id.* In 1993, 1997-1998, and 1998-1999, sea otters moved naturally  
11 into the Management Zone, sometimes in numbers exceeding 100. Complaint, ¶¶ 7, 78, 92. Since 1999,  
12 sea otters have regularly moved in and out of the Management Zone. CSUC Dec., ¶ 64, Halmay Dec.,  
13 ¶ 30. Sea otters can swim as much as 30 miles a day and complete range occupation can occur at a rate  
14 of 18 miles per year. CSUC Dec., ¶¶ 66-69. The principal sea urchin fisheries in the Channel Islands  
15 are only 30 miles from the northern boundary of the Management Zone at Point Conception. *Id.*, ¶ 68.  
16 Currently, over 100 otters are congregated just outside the northern edge of the Management Zone.  
17 Halmay Dec., ¶ 30. It is a principal purpose of Plaintiffs’ suit to facilitate the migration of otters into the  
18 Management Zone and it is inevitable that sea otters will find their way to the principal sea urchin  
19 fishing grounds if the Management Zone is abolished.

22 **B. P.L. 99-625 and the ESA and MMPA**

23 P.L. 99-625 provides that “any incidental taking of [sea otters] during the course of an otherwise  
24 lawful activity within the management zone may not be treated as a violation of the [ESA] or the  
25 [MMPA].” P.L. 99-625, Section 1(c)(2). Even if a remnant of the sea urchin fishery remains should  
26 Plaintiffs prevail, the sea urchin fishery will likely be subject to new and severe regulation under the  
27  
28

1 ESA and MMPA. Both statutes prohibit the taking of sea otters. 16 U.S.C. § 1638(a), 16 U.S.C.  
2 § 1372(a). With respect to the ESA, the Supreme Court has held that habitat modification, including  
3 changes to food availability that can cause death or injury to the listed species equals an ESA taking.  
4 *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Thus,  
5 Proposed Intervenors will at a minimum be subject to new regulation under the ESA for the taking of  
6 sea otters by habitat modification given the competition for sea urchins that will occur if the  
7 Management Zone is terminated. Similarly, the MMPA prohibits taking marine mammals without a  
8 permit and the statute defines taking to include harassment which is defined to include actions that  
9 interfere with marine mammal feeding. 16 U.S.C. §§ 1372(a), 1362(13), (18). *See* CSUC Dec., ¶ 81.  
10

### 11 C. The Commercial Fishery

12 Sea urchins are harvested for food and are valuable seafood for sushi and sashimi in Japan and  
13 the U.S. CSUC Dec., ¶ 17. In 2002, the sea urchin fishery had the highest “at the dock” value (*i.e.*, the  
14 amount paid to fishermen) of all California fisheries. *Id.*, ¶ 24. In 2005-2008, the “at the dock” value  
15 averaged \$7.7 million annually, the third highest shellfish fishery in California. *Id.*, ¶¶ 23, 25.  
16

17 The sea urchin fishery, which began in the 1970s, is conducted from specialized vessels carrying  
18 a crew of one-three divers and a tender. The tender maintains the air system and hoses that support the  
19 divers. *Id.*, ¶¶ 18-19. About 160-170 divers and 135 tenders harvest 10-12 million pounds of urchin  
20 annually. *Id.*, ¶¶ 25, 29, 30. Among the divers, 30% depend on the urchin fishery for 100% of their  
21 income. The average diver derives 63% of all household income from the fishery. *Id.*, ¶ 37. In 2006,  
22 divers paid \$657,662 in wages to tenders and others. *Id.*, ¶ 36.  
23

24 Eleven seafood processors in California process over 95% of the urchin harvest. All are small  
25 businesses. For nine, sea urchins are their only product. *Id.*, ¶ 21. Collectively, these eleven processors  
26 employ about 495 year round workers, 30-60 per facility. *Id.*, ¶ 42. The average sea urchin seafood  
27 processing worker in California earns about \$22,000 annually. *Id.* In 2005-2008, the wholesale value of  
28

1 the processed urchin product approximated \$19.7 million annually (\$14 million for domestic markets  
2 and \$5.7 million for export markets). *Id.*, ¶ 25.

3 **D. The Proposed Intervenors**

4 The California Sea Urchin Commission, a public agency created by the laws of California, began  
5 operations in 2004. *Id.*, ¶ 2. CSUC represents sea urchin fishermen and works closely with urchin  
6 processors, several of whom contribute financially to CSUC. *Id.*, ¶¶ 2, 3. CSUC’s purpose is to ensure  
7 a sustainable sea urchin resource in furtherance of state law that declares “the production and marketing  
8 of seafood, including sea urchin, constitute an important industry of this state that provides substantial  
9 and necessary revenues for the state and employment for its citizens. The production of sea urchin for  
10 domestic consumption and export is one of the leading segments of the state’s commercial fishing  
11 industry.” *Id.*, ¶ 7 quoting Cal. Food and Agriculture Code, §§ 79001-79002. CSUC has the power to  
12 initiate legal actions. CSUC Dec., ¶ 13.

14 CSUC is the immediate successor entity to organizations that were directly involved in the  
15 passage of P.L. 99-625. *Id.*, ¶¶ 43-49. CSUC inherited the portfolio of its predecessors, participating in  
16 the debate about sea urchin/otter interactions and management including filing comments on FWS’  
17 findings regarding the success of the otter translocation program and the need to continue the  
18 Management Zone. *Id.*, ¶¶ 48, 50, 54, 55. CSUC has represented sea urchin fishermen before the  
19 Congress regarding sea otter conservation legislation. *Id.*, ¶¶ 51-53. CSUC has also been involved in  
20 conservation issues relating to interactions between sea otters and the endangered white abalone. *Id.*,  
21 ¶¶ 54, 56. CSUC’s members, sea urchin divers, will be directly impacted if Plaintiffs succeed in  
22 abolishing the Management Zone.

24 Proposed Intervenor Peter Halmay, a commercial sea urchin fisherman, has been actively  
25 involved with fishery management, ocean resource conservation, and sea otter/fishery interaction issues  
26 for three decades. Halmay Dec., ¶¶ 1-20. Mr. Halmay has been appointed by the Director of the  
27

1 California Department of Fish and Game to committees considering sea urchin fishery management and  
2 by FWS to serve on the Southern Sea Otter Recovery Implementation Team. *Id.*, ¶¶ 2, 4, 6. He has  
3 served in a leadership capacity in organizations representing commercial fishermen. *Id.*, ¶¶ 7-12. He  
4 has represented fishermen in many fora, including on issues relating to sea otter and fishery interactions.  
5 *Id.*, ¶¶ 13-20. Mr. Halmay has been heavily involved in issues associated with the Management Zone  
6 and the otter translocation program. *Id.*, ¶¶ 6-8, 10, 11, 13, 15-19. Mr. Halmay has fished commercially  
7 full time since 1976, fishing for sea urchins 100% of the time for 25 years. *Id.*, ¶¶ 21-24. If the  
8 Management Zone is eliminated as Plaintiffs ask, the effects of sea otter predation will end the sea  
9 urchin fishery and Mr. Halmay will lose his only source of income. *Id.*, ¶¶ 29-37.

11 Proposed Intervenor Harry Liquornik has been a full time commercial fisherman for 24 years and  
12 his primary source of income since 1997 has been the sea urchin fishery. Liquornik Dec., ¶ 1. Mr.  
13 Liquornik has also served in leadership roles in organizations representing commercial fishermen  
14 regarding fishery and sea otter conservation, management, and interaction issues. *Id.*, ¶¶ 3-5. Like  
15 CSUC's members and Peter Halmay, Mr. Liquornik's primary income is fishing for urchins. If  
16 Plaintiffs prevail, this income will be lost. *Id.*, ¶¶ 1, 6, 7.

18 Proposed Intervenor California Abalone Association, formed in 1971, is comprised of 87 persons  
19 who fished for abalone before that fishery was closed in 1997. CAA Dec., ¶ 2. Since the closure, CAA  
20 has been actively involved with State officials and others in developing a plan to reopen the abalone  
21 fishery and in conducting and financing research on the abalone resource. *Id.*, ¶¶ 3-7. As a result of  
22 these and other efforts, CAA expects the abalone fishery to be reopened, perhaps as early as next year.  
23 *Id.*, ¶ 8. However, if Plaintiffs prevail and the Management Zone is abolished, sea otters will enter the  
24 zone and otter predation will so reduce abalone populations as to prevent the fishery from reopening.  
25 *Id.*, quoting FWS that "sea otter range expansion ... would preclude the reestablishment of abalone  
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1 fishing....” CAA’s members will be given a priority to participate in any reopened fishery. *Id.*

2 Currently, about half of CAA’s members are also commercial sea urchin fishermen. *Id.*, ¶ 2.

3 Proposed Intervenor Sonoma County Abalone Network is a non-profit public service corporation  
4 of approximately 500 members whose main purpose is the conservation and protection of the abalone  
5 resource. Declaration of Sonoma County Abalone Network (“SCAN Dec.”), attached hereto as Exhibit  
6 6, ¶ 2. SCAN’s members advocate for abalone conservation and use the resource by diving in the ocean  
7 to observe abalone and other ocean life. *Id.*, ¶¶ 2, 6. SCAN was instrumental in developing California’s  
8 Abalone Recovery Management Plan (“ARMP”) that includes the black abalone and white abalone, two  
9 species now listed as endangered under the ESA. *Id.*, ¶ 4. Indeed, SCAN sought protection for white  
10 and black abalone long before either was listed as endangered. *Id.*, ¶ 5. SCAN and its members will be  
11 adversely affected if Plaintiffs succeed in abolishing the Management Zone because sea otter predation  
12 could effectively, if not actually, extirpate abalone populations. *Id.*, ¶¶ 8-10 quoting the ARMP and  
13 other documents that abalone recovery is not achievable in areas where sea otters prey on abalone and  
14 that sea otters entering the Management Zone could be a major cause of the extirpation of abalone  
15 species.  
16  
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#### 18 **IV. ARGUMENT**

##### 19 **A. The Proposed Intervenor Satisfy Rule 24(a)(2) and Should be Granted Intervention** 20 **as of Right**

21 The Ninth Circuit applies a four-part test to determine whether to grant an applicant’s motion to  
22 intervene as a matter of right: (1) the application for intervention must be timely; (2) the applicant must  
23 have a “significantly protectable” interest relating to the property or transaction that is the subject of the  
24 action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter,  
25 impair or impede the applicant’s ability to protect that interest; and (4) the applicant’s interest must not  
26 be adequately represented by the existing parties in the lawsuit. *United States v. Alisal Water Corp.*, 370  
27 F.3d at 919; *United States v. Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002); *Wetlands Action Network*  
28



1 v. *United States Army Corps of Eng'rs*, 222 F.3d 1105, 1113 (9th Cir. 2000), *cert. denied*, 534 U.S. 815  
2 (2001).

3 “Rule 24 is to be construed broadly in favor of the applicant.” *Idaho Farm Bureau Fed’n v.*  
4 *Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). The four-part test is to be applied practically to allow for  
5 the efficient resolution of issues and to provide adequate access to the courts. *See United States v. Los*  
6 *Angeles*, 288 F.3d at 397-98 (“A liberal policy in favor of intervention serves both efficient resolution of  
7 issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome  
8 of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at  
9 the same time, we allow an additional interested party to express its views before the court.” (Emphasis  
10 in original, internal quotation marks and citations omitted)). In keeping with this liberal policy, courts  
11 are required to accept as true the non-conclusory allegations made in support of the motion when  
12 considering an applicant’s motion to intervene. *Southwest Center for Biological Diversity v. Berg*, 268  
13 F.3d 810, 819 (9<sup>th</sup> Cir. 2001).

14  
15  
16 **1. Proposed Intervenors’ motion is timely.**

17 In the Ninth Circuit, courts consider three factors to determine timeliness of an intervention  
18 motion: (1) the stage of the proceedings, (2) prejudice to existing parties, and (3) the reason for any  
19 delay in bringing the motion. *Alisal Water Corp.*, 370 F.3d at 921; *United States v. Oregon*, 913 F.2d  
20 576, 588 (9th Cir. 1990); *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986).

21 Proposed Intervenors meet the timeliness requirement. This suit is at an early stage. No Answer  
22 has been filed, no scheduling conference has taken place, no substantive motion has been filed, and no  
23 briefing has occurred. A motion made at this early stage – indeed the earliest possible stage – in the  
24 proceedings is timely. *See 7C Wright, et al.*, Federal Practice and Procedure § 1916 (3d ed. 2007) (“an  
25 application made before the existing parties have joined issue in the pleadings has been regarded as  
26  
27  
28

1 clearly timely;”) *Council v. Glickman*, 82 F.3d 825, 837 (9<sup>th</sup> Cir. 1996). Granting Proposed Intervenors’  
2 motion at this early stage will not prejudice the existing parties.

3 **2. Proposed Intervenors have significant and protectable legal interests.**

4 The interest test in Fed. R. Civ. P. 24(a)(2) is interpreted broadly and requires intervention by  
5 Proposed Intervenors.

6 The ‘interest’ test is not a clear-cut or bright-line rule, because no specific  
7 legal or equitable interest need be established. Instead, the ‘interest’ test  
8 directs courts to make a practical, threshold inquiry, and is primarily a  
9 practical guide to disposing of lawsuits by involving as many apparently  
concerned persons as is compatible with efficiency and due process.

10 *United States v. Los Angeles*, 288 F.3d at 398 (internal quotation marks and citations omitted); *see also*  
11 *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9<sup>th</sup> Cir. 1995)  
12 (“Whether an applicant for intervention demonstrates sufficient interest in an action is a practical,  
13 threshold inquiry. No specific [form of] legal or equitable interest need be established.” (Internal  
14 quotation marks and citations omitted)); *Green v. United States*, 996 F.2d 973, 976 (9<sup>th</sup> Cir. 1993) (“It is  
15 generally enough that the interest [asserted] is protectable under some law, and that there is a  
16 relationship between the legally protected interest and the claims at issue.”); *Sierra Club, et al. v. U.S.*  
17 *Environmental Protection Agency, et al.*, 995 F.2d 1478, 1484, 1485-86 (9<sup>th</sup> Cir. 1993) (City of Phoenix  
18 entitled to intervene because the City’s Clean Water Act permit could be affected by litigation to compel  
19 EPA to raise water quality standards).

20  
21 While no specific fact is determinative of a motion to intervene, certain factors militate in favor  
22 of permitting mandatory intervention. For example, where a proposed intervenor is an intended  
23 beneficiary of a statute that is the subject of an action, such beneficiary status weighs in favor of  
24 permitting that party to intervene in order to protect its interests under that statute. *See, e.g., County of*  
25 *Fresno v. Andrus*, 622 F.2d. 436, 438 (9<sup>th</sup> Cir. 1980) (trial court’s order denying motion for mandatory  
26 intervention reversed where the intervenors “are precisely those Congress intended to protect”); *State of*  
27  
28

1 *California v. American Assoc. of Pro-Life Obstetricians and Gynecologists*, 450 F.3d 436, 441 (9<sup>th</sup> Cir.  
2 2006) (mandatory intervention appropriate where the proposed intervenors were among the class of  
3 intended beneficiaries of the statute at issue).

4 Furthermore, when the remedies sought by the plaintiff would be likely to affect the putative  
5 intervenors, intervention is appropriate. *American Assoc. of Pro-Life Obstetricians and Gynecologists*.  
6 450 F.3d at 441; *U.S. v. Stringfellow*, 783 F.2d 821, 827 (9<sup>th</sup> Cir. 1986) (“Where ... a proposed  
7 intervenor has demonstrated a clear interest in the remedial scheme, and where the prospective  
8 intervenor seeks to obtain remedies that differ from those sought by the original plaintiffs, it is  
9 reasonable to conclude that disposition of the litigation may impair the prospective intervenor’s ability  
10 to protect its interests.”). Finally, “when . . . the injunctive relief sought by plaintiff will have direct,  
11 immediate and harmful effects upon a third party’s legally protectable interests, that party ... has a  
12 significantly protectable interest that relates to the property or transaction that is the subject of the  
13 action.” *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d at 1494.

14  
15  
16 Within the specific context of environmental litigation, courts in this Circuit have routinely held  
17 that associations representing commercial and other interests have significant and protectable interests.  
18 It is well-established that an association may intervene on behalf of its members who possess a  
19 protectable legal interest. *See Nat’l Resource Defense Council v. Gutierrez*, 2007 U.S. Dist. LEXIS  
20 40895 \* 26-27 (N.D. Cal.) (in an action arising under the Magnuson-Stevens Act, an association of  
21 seafood processors is authorized to intervene as a matter of right on behalf of its individual members,  
22 since “having a unified group that represents a common front . . . is an effective way of protecting the  
23 interests of . . . members.”); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9<sup>th</sup> Cir.  
24 2001) (builder and building trade associations permitted to intervene as a matter of right in an ESA case  
25 arising where the relief sought would have a direct, immediate and harmful effect on the putative  
26 intervenor’s interests and where the association’s members developed their land in reliance upon an  
27  
28

1 ESA permit provided to the City of San Diego); *State of California v. Bergland*, 1979 U.S. Dist. LEXIS  
2 9503 \*16-17 (E.D. Cal.) (“This group of associations of lumber producers clearly has an interest that  
3 could be impaired by a decision in this case.”); *Natural Resource Defense Council v. Norton*, 2006 U.S.  
4 App. LEXIS 10087 (9<sup>th</sup> Cir.) (contractors permitted to intervene as a matter of right in a suit brought by  
5 environmental groups against federal officials challenging a biological opinion relating to the operation  
6 of water storage and diversion projects); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 895-96 (N.D.  
7 Cal. 1984) (in a case brought by an environmental organization alleging the Environmental Protection  
8 Agency had failed to timely promulgate air pollutant regulations, a mining association was permitted to  
9 intervene as a matter of right where its members would be “directly affected” by final emission  
10 standards); *County of Fresno v. Andrus*, 622 F.2d at 438 (association of farmers permitted to intervene  
11 where farmers “are precisely those Congress intended to protect” via land reclamation acts and  
12 “precisely those who will be injured” if the Department of the Interior did not act expeditiously under  
13 the acts).

14  
15 Applying these rules of law to the facts of the instant case, Proposed Intervenor’s significant and  
16 protectable legal interests become evident. First, the purposes underlying P.L. 99-625 include the  
17 protection of interests represented by Proposed Intervenor. Specifically, the Management Zone  
18 Plaintiffs seek to abolish was formulated, in part, to protect sea urchin and other commercial fisheries.  
19 Even Plaintiffs acknowledge this fact in their Complaint. Complaint, ¶¶ 3, 51, 61.

20  
21 The importance of protecting sea urchin fisheries is acknowledged in P.L. 99-625 which states:

22 The purpose of the management zone is to ... prevent, to the maximum  
23 extent feasible, conflict with other fishery resources within the  
24 management zone by the experimental population.

25 Section 1(b)(4). Likewise, the Notice of Record of Decision implementing P.L. 99-625 states:

26 Because the reintroduction of sea otters to waters surrounding San Nicolas  
27 [I]sland would have adverse impacts on fisheries in particular, the  
28 translocation plan ... would establish a management, or otter-free, zone  
from which any sea otter would be captured and removed using non-lethal

1 means.... *Maintenance of this management zone free of otters is the*  
2 *principal mitigation feature of the proposal for fisheries and other*  
3 *environmental and socioeconomic impacts.* Implementation of this  
4 management zone would confine the impact of translocated sea otters on  
5 fisheries to the immediate vicinity around San Nicolas Island. In addition,  
6 it would prevent the existing population from expanding its range into  
7 major shellfish and gillnet fisheries of southern California south of Point  
8 Conception ... it would preclude significant conflicts between sea otters  
9 and fisheries and other marine resource uses throughout southern  
10 California coastal waters south of Point Conception.... The management  
11 zone is economically important to the fishery interests in the region.

12 52 Fed. Reg. 29784, 29787 (Aug. 11, 1987)(emphasis added). In short, Proposed Intervenor benefit  
13 from the current resource management system established by P.L. 99-625. Plaintiffs seek to change that  
14 system to the detriment of Proposed Intervenor. As such, Proposed Intervenor should be permitted to  
15 participate in this lawsuit in order to protect their livelihood and other interests.

16 Second, Proposed Intervenor have a legal interest in this matter because Plaintiffs' remedy, *i.e.*,  
17 abolishing the Management Zone, will inevitably affect Proposed Intervenor. As noted above,  
18 Proposed Intervenor fish for sea urchins in the Management Zone, sea urchins are a primary prey of  
19 otters, sea otters are expected to occupy the Management Zone, and there is an inverse relationship  
20 between sea otter and sea urchin population levels. If the Management Zone is abolished, sea otter  
21 predation on sea urchins will likely end the sea urchin fishery and prevent the reopening of the abalone  
22 fishery. Proposed Intervenor have a cognizable legal interest and fishermen have had longstanding  
23 interest and concern regarding the impact of sea otter range expansion on fishery resources. Complaint,  
24 ¶¶ 3, 46, 51, 61.

25 This interest and concern arises from the fact that if Plaintiffs prevail and the sea urchin fishery  
26 is severely curtailed or eliminated, that portion of the total annual revenue earned by CSUC members  
27 that comes from the sea urchin harvest in the Management Zone (85% of \$7.7 million or \$6.5 million) is  
28

1 likely lost. CSUC Dec., ¶¶ 25, 26, 88.<sup>4</sup> Also at risk are \$658,000 in wages to tenders. *Id.*, ¶ 88. More  
2 importantly, all of the dependent jobs of divers and tenders, perhaps 300 people, are at risk. *Id.*, ¶¶ 29,  
3 30; Halmay Dec., ¶ 23. In addition, if the southern California sea urchin fishery collapses, the urchin  
4 processors who process only sea urchins could be forced to terminate 315 employees and that could  
5 mean a loss of almost \$7 million to local economies from wages lost. CSUC Dec., ¶¶ 41, 42.<sup>5</sup>

6 These overall impacts are given individual meaning in the case of Proposed Intervenor Halmay  
7 and Liquornik. Sea otter predation on shellfish resources in the Management Zone will directly impact  
8 the livelihood of Mr. Halmay who earns 100% of his income from the urchin fishery and Mr. Liquornik  
9 for whom the urchin fishery is his primary source of income. Halmay Dec., ¶¶ 35-37; Liquornik Dec.,  
10 ¶ 1.

11  
12 CAA members, 50% of whom are also sea urchin fishermen, will see their actual income as  
13 urchin fishermen drop dramatically if Plaintiffs succeed in abolishing the Management Zone. More  
14 importantly, CAA members will see any hope of reopening the abalone fishery in the Management Zone  
15 evaporate. CAA and its members have expended time and money for years to reopen that fishery and  
16 will have a priority to participate if it reopens. CAA Dec., ¶¶ 2, 5, 8.

17  
18 If Plaintiffs prevail, SCAN and its members will see their work to recover California's abalone  
19 resource, including the endangered black abalone and white abalone, and to observe abalone in the  
20 ocean thwarted due to the ensuing sea otter predation on abalone.

21  
22 Third, even if a portion of the southern California sea urchin fishery or likely abalone fishery  
23 survive in the wake of abolishing the Management Zone, Proposed Intervenor will, as a result of such  
24 abolition, be subjected to onerous new regulations hampering their ability to earn their livelihood.

25  
26 <sup>4</sup> Sea urchin fishermen have no alternative fisheries to enter because most fisheries (90%) restrict new  
27 entrants and because of the high costs (\$100,000-\$150,000) of entering those that are not restricted.  
28 CSUC Dec., ¶ 39, Halmay Dec., ¶ 36.

<sup>5</sup> Also lost would be payments to sea urchin suppliers that approximate \$29,000 per urchin diver, and  
taxes based on earnings that amount to \$572,000. CSUC Dec., ¶¶ 34, 35.

1 CSUC Dec., ¶ 81. The ESA’s prohibitions on taking a listed species without a permit<sup>6</sup> do not apply  
2 while the Management Zone is in place. P.L. 99-625, Section 1(c)(2). However, if the Management  
3 Zone is abolished, Proposed Intervenors will become subject to these prohibitions. The Supreme Court  
4 has construed the term “take” as including habitat modification that kills or injures wildlife by impairing  
5 essential behavior patterns such as feeding. *Babbitt v. Sweet Home Chapter of Communities for a Great*  
6 *Oregon*, 515 U.S. 587 (1995). Thus, if the otter Management Zone is abolished, and a finding is  
7 thereafter made that the sea urchin fishery affects a food source for otters that rises to a taking, then  
8 urchin fishing would be prohibited without a permit. 16 U.S.C. § 1539. Obtaining such a permit  
9 requires the applicant to commit to mitigation measures, including providing necessary funding for such  
10 measures, and to any other restrictions deemed appropriate by the Secretary. 16 U.S.C. § 1539(a)(2).

12 Similarly, the MMPA prohibits the taking of marine mammals such as sea otters absent a permit.  
13 16 U.S.C. § 1372. The term “take” is defined in 16 U.S.C. § 1362(13) as including harassing or killing  
14 and the term “harassment” is defined at 16 U.S.C. § 1362(18) to include disturbing a marine mammal by  
15 disrupting behavioral patterns such as feeding. The MMPA subjects fishermen who propose to take  
16 marine mammals to certain permitting requirements. 16 U.S.C. § 1371(a)(3). Pursuant to Section  
17 1(c)(2) of P.L. 99-625, the no take provisions of the MMPA are presently inapplicable while the  
18 Management Zone exists. Termination of the Management Zone would subject Proposed Intervenors to  
19 the MMPA’s take prohibitions and permit requirements.  
20

21 Courts in this Circuit have held that where a decision in favor of a plaintiff would have the  
22 practical effect of binding a proposed intervenor to a new or expanded regulatory regime, the proposed  
23 intervenor has established a sufficient potential nexus between the plaintiff’s claims and the intervenor’s  
24 interests to support mandatory intervention. *See, e.g., Forest Conservation Council v. U.S. Forest*  
25 *Service*, 66 F.3d at 1496 (intervention proper were the intervenor “could be legally bound by the court’s  
26

27  
28 <sup>6</sup> *See* 16 U.S.C. § 1538(a)(1)(B).

1 decree.”). If the Management Zone were abolished, Proposed Intervenors would be subject to an  
2 entirely new regulatory scheme. Thus, Proposed Intervenors should be permitted to participate in this  
3 case to advocate their interests in response to Plaintiffs’ efforts to jeopardize their livelihood by  
4 terminating the Management Zone.

5 **3. Disposition of this case may impair Proposed Intervenors’ substantially**  
6 **protectable legal interests.**

7 A Court’s determination of whether the litigation will impair or impede Proposed Intervenors’  
8 interests is governed by practical considerations. *United States v. Oregon*, 839 F.2d 635, 639 (9th Cir.  
9 1988) (stating the Ninth Circuit has recognized “practical limitations on the ability of intervention  
10 applicants to protect their interests in the subject of litigation after court-ordered equitable remedies are  
11 in place”); *Yniguez v. Arizona*, 939 F.2d 727, 735 (9th Cir. 1991) (“[T]he question ... is whether the  
12 district court’s decision will result in practical impairment of the interests of [the applicants], not  
13 whether the decision itself binds them.”).

14  
15 The relief sought by Plaintiffs threatens to impair Proposed Intervenors’ interests in a real and  
16 immediate fashion. Abolition of the Management Zone will eliminate an important mechanism  
17 designed to balance the interests of the sea otter population and commercial fisheries. This abolition  
18 will allow unfettered sea otter predation upon sea urchins and abalone, directly resulting in the  
19 annihilation of the southern California sea urchin fishery, preventing the reopening of the abalone  
20 fishery, and preventing the recovery of abalone generally. This directly affects Proposed Intervenors’  
21 livelihood, conservation, and usage interests. Even if a fishery survived, it would likely be subject to  
22 new and extensive regulation. There is a direct nexus between the remedies sought by Plaintiffs and the  
23 impairment of Proposed Intervenors’ legally-recognized interests.  
24

25 **4. None of the parties adequately represent Proposed Intervenors’ interests.**

26 Applicants for intervention need only show that representation of the applicant’s interest “may  
27 be” inadequate, and the burden of making that showing is minimal. *Trbovich v. United Mine Workers of*  
28



1 *America*, 404 U.S. 528, 538 n.10 (1972); *see also*, *United States v. Stringfellow*, 783 F.2d at 827 (“where  
2 the government was the purported representative, we have held that the requirement of inadequacy of  
3 representation is satisfied if the applicant shows that representation of its interests *may be* inadequate  
4 and ... the burden of making that showing is minimal”) (internal quotation marks and citations omitted)  
5 (emphasis added). The Court must resolve any doubts about the adequacy of the representation in favor  
6 of permitting intervention. *Sagebrush Rebellion, Inc., et al. v. James G. Watt, et al.*, 713 F.2d 525, 528  
7 (9<sup>th</sup> Cir. 1983). Thus, where a government agency will not offer the same perspective and therefore may  
8 not make the same arguments as the proposed intervenor, it does not adequately represent the applicant’s  
9 interests. *Id.*

11 Here, Proposed Intervenors have unique economic, conservation, and aesthetic interests that  
12 cannot be defended by Defendants, particularly since FWS has already reached a preliminary  
13 determination regarding the results of the otter translocation program and, therefore, the continuation of  
14 the Management Zone that is adverse to Proposed Intervenors. Complaint, ¶¶ 81, 86, 114. Further,  
15 FWS is an environmental regulatory agency. The federal defendants’ sole interest here is in the  
16 protection of threatened and endangered species and the faithful implementation of the ESA. The  
17 federal defendants have no interest in, or responsibility for, the fishery that will be at issue if Plaintiffs  
18 prevail or reach a favorable settlement. Finally, FWS has interests and motivations in any potential  
19 settlement discussions that may diverge from Proposed Intervenors’ interest in upholding the otter  
20 translocation program and Management Zone. For instance, FWS may be tempted to settle the litigation  
21 with Plaintiffs to finalize and effectuate the preliminary determination made by FWS that the otter  
22 translocation has failed and, therefore, the Management Zone should be terminated. If this happens, it  
23 may precipitate further litigation and would jeopardize Proposed Intervenors’ economic, regulatory,  
24 conservation, and other interests. The possibility that the existing parties might compromise the  
25 litigation to the prejudice of a permittee seeking to intervene satisfies the fourth requirement for  
26  
27  
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1 intervention as of right, even where a permittee-applicant’s goal in the litigation is, at some level,  
2 identical to that of the existing governmental party. *See, e.g., Nat’l Wildlife Fed’n v. United States Army*  
3 *Corps of Eng’rs*, 188 F.R.D. 381, 385 (D. Or. 1999) (finding Corps of Engineers not likely to represent  
4 interests of Clean Water Act permittee even though permittee sought the same litigation goal of  
5 preserving the status quo). Indeed, the mere *possibility* that the existing parties might compromise the  
6 litigation to the prejudice of an applicant-intervenor has been held to satisfy the fourth requirement for  
7 intervention as of right. *Nextel Commc’ns of the Mid-Atlantic, Inc. v. Town of Hanson*, 311 F. Supp. 2d  
8 142, 152-53, 161 (D. Mass. 2004) (holding that even where applicant’s goal in litigation is *identical* to  
9 an existing party public agency’s litigation objective, and the public agency could, would, and in fact did  
10 raise the same arguments as the applicants, the possibility that the existing parties might compromise to  
11 the applicants’ prejudice meets the minimal burden of showing inadequate representation).

12  
13 **B. Proposed Intervenors Satisfy the Standard for Permissive Intervention**

14 If this Court denies Proposed Intervenors’ motion to intervene as of right in whole or in part, the  
15 Court should grant Proposed Intervenors permission to intervene pursuant to Rule 24(b)(1), (3). That  
16 rule provides in pertinent part:  
17

18           Upon timely application anyone may be permitted to intervene in an  
19           action ... when an applicant’s claim or defense and the main action have a  
20           question of law or fact in common.... In exercising its discretion the court  
                shall consider whether the intervention will unduly delay or prejudice the  
                adjudication of the rights of the original parties.

21 Fed. R. Civ. P. 24(b)(1), (3). Notably, Rule 24(b) “plainly dispenses with any requirement that the  
22 intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.” *SEC v.*  
23 *United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940); *see also Kootenai Tribe of Idaho v.*  
24 *United States Forest Serv.*, 313 F.3d 1094, 1108, 1111 n.10 (9th Cir. 2002). Importantly, “[u]nlike Rule  
25 24(a), a ‘significant protectable interest’ is not required by Rule 24(b) for intervention; all that is  
26  
27  
28

1 necessary for permissive intervention is that intervenor’s ‘claim or defense and the main action have a  
2 question of law or fact in common.’” *Id.*, at 1108.<sup>7</sup>

3 Permissive intervention is committed to the broad discretion of the district court. *See County of*  
4 *Orange v. Air California*, 799 F.2d at 539 (affirming a district court decision to deny permissive  
5 intervention to the applicant because it determined the applicant’s motion was untimely). Beyond  
6 timeliness, which Proposed Intervenors satisfy, Proposed Intervenors meet the core requirement for  
7 permissive intervention: they seek to defend the validity of the otter translocation and management  
8 program at issue. Thus, Proposed Intervenors satisfy the literal requirement of Rule 24(b)(1)(B)  
9 respecting a common question of law or fact. Furthermore, because Proposed Intervenors seek to  
10 intervene at the outset of the case prior to the filing of any substantive motion or brief, no credible  
11 argument can be made that granting intervention will result in undue delay or prejudice.  
12

13 Finally, to promote judicial economy, it is appropriate to permit intervention because Proposed  
14 Intervenors have demonstrated an ongoing interest in otter and ocean resource management. Among  
15 other things: (i) Proposed Intervenors derive virtually all of their livelihood from fishing within the  
16 Management Zone; (ii) Proposed Intervenors have represented the interests of sea urchin fishermen in  
17 southern California; (iii) the Management Zone structure established pursuant to P.L. 99-625 was  
18 designed, in substantial part, to protect the interests and address the concerns of fishermen within the  
19 Management Zone; and (iv) Proposed Intervenors have conservation and other interests in marine  
20 resources. *See* Complaint, ¶ 61.  
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25 <sup>7</sup> In the 9th Circuit, applicants seeking permissive intervention pursuant to Rule 24(b) must also show  
26 that the court has an independent basis for jurisdiction over its claims or defenses. *See Donnelly v.*  
27 *Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (*citing Northwest Forest Resource Council v. Glickman*, 82  
28 F.3d at 839). Here, Proposed Intervenors are not asserting any claims or defenses that are not based on  
federal question jurisdiction, so this ancillary requirement is fulfilled. *See* Proposed Intervenors  
Proposed Answer lodged concurrently herewith.

1 On these facts, permissive intervention is warranted. *See United States v. Los Angeles*, 288 F.3d  
2 at 397-98 (“A liberal policy in favor of intervention serves both efficient resolution of issues and  
3 broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a  
4 particular case to intervene, we often prevent or simplify future litigation involving related issues; at the  
5 same time, we allow an additional interested party to express its views before the court.”) (Emphasis in  
6 original, internal quotation marks and citations omitted). *Accord* Fed. R. Civ. P. 24 Advisory  
7 Committee Notes (“If an [applicant] would be substantially affected in a practical sense by the  
8 determination made in an action, he should, as a general rule, be entitled to intervene....”).

9  
10 A district court decision granting applicants’ Rule 24(b) motion to intervene under analogous  
11 circumstances was affirmed in *Kootenai Tribe of Idaho v. United States Forest Service*, 313 F.3d 1094  
12 (9<sup>th</sup> Cir. 2002). In that case, the applicants sought to intervene to defend a rule promulgated by the  
13 Forest Service to limit development of roadless areas in the National Forests. The court held the  
14 applicants satisfied the literal requirements of Rule 24(b), and the presence of intervenors would assist  
15 the court in resolving the case. *Id.*, at 1110-11. Other courts have likewise recognized the broad scope  
16 of Rule 24(b) when the would-be intervenor does not meet the standard for Rule 24(a) mandatory  
17 intervention. *See, e.g., Earth Island Institute v. Baker*, 1992 U.S. Dist. LEXIS 8604 (N.D. Cal. 1992)  
18 (industry trade association permitted to intervene under Rule 24(b) in an action by a public interest  
19 organization seeking to implement a statute prohibiting the importation of shrimp products harvested by  
20 methods adversely affecting endangered sea turtle species.); *Bergland, supra*, (associations of lumber  
21 producers permitted to intervene under Rule 24(b) in an action brought by the State of California against  
22 a federal agency seeking to invalidate an environmental impact statement).

23  
24  
25 If the Court denies intervention as of right, it should grant Proposed Intervenors alternative  
26 motion for permissive intervention.  
27  
28

1 **V. CONCLUSION**

2 For the reasons stated above, Proposed Intervenors respectfully request that the Court (1) grant  
3 Proposed Intervenors' leave to intervene in the action; and (2) order that the proposed Answer submitted  
4 concurrently with this motion be filed.<sup>8</sup>

5  
6 Dated: December 17, 2009

Respectfully submitted,

7  
8 NOSSAMAN LLP  
9 BENJAMIN Z. RUBIN  
10 GEORGE J. MANNINA, JR., *pro hac vice*

11 /s/  
12 Benjamin Z. Rubin

13 *Attorneys for Proposed Intervenor-Defendants*

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16  
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19 \_\_\_\_\_  
20 <sup>8</sup> The proposed Answer also asserts certain cross-claims against Defendants pursuant to Fed. R. Civ. P.  
21 13(g) that arise out of the same transaction and occurrence as the Plaintiffs' principal claim. It is well-  
22 established that once an intervenor has established its entitlement to intervention permissively or of  
23 right, it may assert such cross-claims as a matter of course. *See, e.g., Crosby Yacht Yard v. Yacht*  
24 *"Chardonnay"*, 159 FRD 1, 10 (D. Mass. 1994) ("as long as intervention has not been conditioned to  
25 provide otherwise, an intervenor has the right to bring a counterclaim or a cross-claim against an  
26 existing party."); *Travelsource Corp. v. Old Republic Int'l Corp.*, 1986 U.S. Dist. LEXIS 28140 at \*3  
27 (N.D. Ill. March 14, 1986); *Kristensons-Petroleum, Inc. v. Sealock Tanker Co.*, 304 F. Supp. 2d 584,  
28 590 (S.D.N.Y. 2004), *aff'd.*, 2005 U.S. App. LEXIS 23933 (2d Cir. Nov. 3, 2005) ("As an intervenor-  
party defendant, Blanc enjoys the status of a party and shares Sealock's rights as a defendant.... Once  
the right to intervene is established, the intervenor's status is equivalent to that of a party....  
Accordingly, Blanc has standing to answer and assert affirmative defenses."); *Association of*  
*Contracting Plumbers of the City of New York, Inc. v. Local Union No. 2 United Association of*  
*Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the U.S.*, 841 F.2d 461, 467  
(2d Cir. 1988) ("Once the right to intervene is established, the intervenor's status is equivalent to that of  
a party.").

**CERTIFICATE OF SERVICE**

1  
2        X I hereby certify that on December 17, 2009, the foregoing Notice of Motion,  
3 Motion of California Sea Urchin Commission, Peter Halmay, Harry Liquornik, California  
4 Abalone Association, and Sonoma County Abalone Network for Leave to Intervene Under  
5 FRCP 24, Memorandum of Points and Authorities in Support Thereof, [Proposed] Answer to  
6 Intervene, and [Proposed] Order were electronically transmitted to the Clerk's Office using the  
7 CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following  
8 CM/ECF registrants:  
9

10                Brian Segee, Staff Attorney  
11                bsegee@edenet.org  
12                Linda Krop, Chief Counsel  
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14                Environmental Defense Center  
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19                USDOJ-ENRD  
20                Wildlife and Marine Resources Section  
21                Ben Franklin Station  
22                P.O. Box 7369  
23                Washington, D.C. 20044

24  
25        \_\_\_\_ I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 2009, I served the attached  
26 document by United States mail on the following, who are not registered participants of the  
27 CM/ECF System:  
28

/s/ \_\_\_\_\_  
Benjamin Z. Rubin