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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA
11

12 CALIFORNIA DUMP TRUCK OWNERS
13 ASSOCIATION

14 Plaintiff,

15 vs.

16 MARY D. NICHOLS, Chairperson of the
California Air Resources Board; JAMES
17 GOLDSTENE, Executive Officer of the
California Air Resources Board; and DOES 1-
18 50

19 Defendants.
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Case No. 2:11-CV-00384-MCE-GGH

**OPPOSITION TO MOTION TO
INTERVENE**

Date: May 5, 2011
Time: : 2:00 p.m.
Judge: : Hon. Morrison C. England
Courtroom: 7

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22 **I. INTRODUCTION**
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24 By motion filed on April 5, 2011, proposed intervener Natural Resources Defense
25 Council ("NRDC") has moved for intervention as of right under Federal Rule of Civil Procedure
26 24(a), and alternatively for permissive intervention under Federal Rule of Civil Procedure 24(b).
27 Plaintiff hereby opposes the motion because NRDC has failed to demonstrate the requirements
28 under Rule 24(a) and would unduly delay proceedings within the meaning of Rule 24(b)(3).

1 This case is fairly simple and presents a discrete legal question: whether a regulation
2 promulgated by the California Air Resources Board (“CARB”) is preempted by federal law. For
3 obvious reasons, the named defendants, as Executive Director and Chair of the state agency in
4 question, are best situated to defend the legality of the regulation promulgated by their agency.
5 The question is a binary one: either the regulation is preempted or it is not. There is no middle
6 ground, and because plaintiff desires a judicial determination of the legal question presented
7 there is no possibility of a settlement.

8 Moreover, the law on preemption is fairly settled, and the relevant facts are not likely to
9 be in dispute. The litigation will likely be resolved via summary judgment after briefing, and
10 because the legal question is discrete, there is little that NRDC (or any other intervener) can add
11 to this case as an intervener that cannot be accomplished by the simple expedient of filing a brief
12 as an amicus curiae. Accordingly, permission to intervene should be denied.

13 14 **II. INTERVENTION OF RIGHT**

15 Intervention of right is governed by Rule 24(a) which provides:

16 (a) Intervention of Right. On timely motion, the court must permit anyone
17 to intervene who:

- 18 (1) is given an unconditional right to intervene by a federal statute; or
19 (2) claims an interest relating to the property or transaction that is the
20 subject of the action, and is so situated that disposing of the action may as a
21 practical matter impair or impede the movant's ability to protect its interest, unless
existing parties adequately represent that interest.

22 This case concerns Rule 24(a)(2) because NRDC has not claimed or identified any federal statute
23 which purports to give them an unconditional right to intervene. As will be demonstrated,
24 NRDC has failed to show they have a sufficient interest in the litigation, and has failed to show
25 that the existing defendants do not adequately represent any interest they may have.

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1 In this circuit, courts apply a four-part test in analyzing request to intervene of right.
2 Specifically, courts require an applicant for intervention to show:

3
4 (1) it has a ‘significant protectable interest’ relating to the property or transaction
5 that is the subject of the action; (2) the disposition of the action may, as a practical
6 matter, impair or impede the applicant's ability to protect its interest; (3) the
7 application is timely; and (4) the existing parties may not adequately represent the
8 applicant's interest.

9 *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Importantly, an applicant's “[f]ailure
10 to satisfy any one of the requirements is fatal to the application, and we need not reach the
11 remaining elements if one of the elements is not satisfied.” *Perry v. Proposition 8 Official*
12 *Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

13 A. NRDC Has Failed to Demonstrate Any Significant Protectable Interest

14 To demonstrate a sufficiently protectable interest, a prospective intervener must establish
15 both:

16 (1) the interest asserted is protectable under some law and
17 (2) there is a relationship between the legally protected interest and the claims at issue.

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19 *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996), internal
20 citations and quotations omitted.

21 NRDC articulates a public interest in this litigation, inasmuch as it claims to represent
22 400,000 members nationwide, and 70,000 members in California. Motion at 6. Purportedly,
23 these members stand to benefit directly from the implementation of the regulation at issue, to the
24 extent it will result in a reduction of air pollution. However, NRDC fails to identify that their
25 interest is “protectable under some law” and instead merely alludes generally to Article III
26 standing. *Id.* The request should be denied on that basis alone.

27 But even assuming arguendo that NRDC could show that its members’ interest in air
28 pollution is protectable under some law, the motion fails to show a relationship between the

1 protected interest and the claims at issue. Specifically, whatever interest NRDC members may
2 have in reducing air pollution generally, the instant lawsuit does not impact that interest. To the
3 contrary, the instant case merely seeks a declaration that as to a specific class of vehicles, i.e.
4 motor carriers, Congress has already spoken, and has preempted state and local regulation. If
5 plaintiff prevails, the CARB remains free to promulgate any number of regulations to reduce air
6 pollution in areas where Congress has not already acted.

7 Thus, there is no relationship between any interest NRDC members may have and legal
8 issue in this case. A declaration that the particular regulation at issue is preempted will in no
9 way prevent CARB from achieving air quality standards through other regulations that are not
10 preempted, nor will it prevent NRDC members from advocating to CARB their ideas as to how
11 such regulations should be crafted.

12 13 B. The Named Defendants Will Adequately Represent the Claimed Interest

14 The burden of showing the inadequacy of the representation is on the applicant. See
15 *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). NRDC claims that 70,000
16 members are citizens of California. Significantly, in a case that also raised environmental
17 concerns of citizens, the court found that when the state is already a party, a compelling interest
18 must be shown because the state is presumed to represent the interests of all of its citizens. *U.S.*
19 *v. Hooker Chemicals & Plastics Corp.*, 101 F.R.D. 451 (D.C.N.Y.1984).

20 In attempting to demonstrate that CARB cannot adequately represent its interests, NRDC
21 argues that because CARB is a governmental entity, it represents other interests, such as the
22 economic impact of its regulations, a concern which NRDC apparently does not share. Motion
23 at 8-9. In fact, NRDC points out that it disagreed with CARB during the crafting of the
24 regulation. Motion at 9.¹ However, NRDC fails to indicate whether its objections had anything
25 to do with the challenge asserted by plaintiff in this action.

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28 ¹ Nearly 600 separate individuals and entities submitted public comments during the rulemaking
process. Decl. of Patrick Whalen, ¶3. Under NRDC's view, anyone of those persons or entities
would be entitled to intervene in this litigation.

1 But in any event, NRDC's argument misunderstands the nature of the litigation and the
2 posture of the regulation being challenged. Whatever interests CARB may have considered in
3 crafting the rule, the fact remains that the rule was ultimately enacted, and it is that rule which
4 CARB is legally obligated to defend. Whatever competing interests CARB may consider in the
5 process of enacting regulations, once they are enacted, the regulations represent the product of
6 that process, and it is that final rule that CARB will defend. NRDC has indicated that it will seek
7 to defend the same regulation. Thus, there is no showing that CARB will inadequately represent
8 the interest. Moreover, the mere fact that an environmental group has previously disagreed with
9 the governmental entity does not establish that the governmental entity would not adequately
10 represent its interests. *Kane County, Utah v. United States*, 597 F.3d 1129, 1133-1135 (10th
11 Cir. 2010).

12 In addition, to the extent NRDC seeks to defend the regulation against federal
13 preemption, the NRDC members' interest is virtually identical to that of the named defendants.
14 By state law, CARB is charged with having primary responsibility for the control of air pollution
15 from vehicular sources. Cal. Health and Safety Code sec. 39002. It is also the designated air
16 pollution control agency for purposes set forth in federal law. Cal. Health and Safety Code sec.
17 39602. Accordingly, the named defendants are charged by law with the same public interest as
18 NRDC claims. Elsewhere in its motion, NRDC acknowledges that the defenses it will raise are
19 legally and factually similar to the main action. Motion at 10. If the claimed interest is identical
20 to that of one of the present parties, or if there is a party charged by law with representing the
21 absentee's interest, then a compelling showing should be required to demonstrate why this
22 representation is not adequate. *Attorney General v. Brockton Agricultural Society*, 456 N.E.2d
23 1130, 1133 (Mass. 1983.)

24 NRDC offers only speculation that CARB will voluntarily weaken the regulation or settle
25 the case in a manner adverse to their interests. But there has been no indication that CARB will
26 engage in any such actions, and the nature of this case makes such outcomes unlikely. There
27 likely will be no settlement, because CARB will presumably defend the regulation it took years
28 to craft. And there will consequently be no voluntary weakening of the rule; and weakening of

1 the rule will come as a result of this Courts determination on the merits. The speculation offered
2 by NRDC is hardly compelling.

3 In general, the rule is that

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5 representation is adequate if no collusion is shown between the representative and
6 an opposing party, if the representative does not have or represent an interest
7 adverse to the proposed intervener and if the representative does not fail in the
8 fulfillment of his duty.

9 *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir 1969); *Peterson v. U.S.*, 41 F.R.D. 131
10 (D.C.Minn.1966); *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962). Here, NRDC has
11 failed to show any collusion, has failed to show that the named defendants have an adverse
12 interest, and has failed to show that CARB will not fulfill its duty to defend its own regulation.
13 Accordingly, intervention of right should be denied.

14 **II. PERMISSIVE INTERVENTION SHOULD ALSO BE DENIED**

15 Permissive intervention is governed under Rule 24(b). Specifically, rule 24(b)(3)
16 provides: “In exercising its discretion, the court must consider whether the intervention will
17 unduly delay or prejudice the adjudication of the original parties' rights.” In this case, NRDC
18 has already expressed its intent to file separate briefing from that of CARB. Decl. of Patrick
19 Whalen. In this case, permitting intervention will result in the plaintiff not only being forced to
20 respond to “the awesome power of the State” but also having to respond to separate briefing by a
21 well-funded, nationwide organization. See *Brewer v. Williams*, 430 U.S. 387, 409 (1977). This
22 will likely not only delay resolution of the issues, but could prejudice plaintiff’s rights. And for
23 the reasons stated earlier, because NRDC’s interests are identical to that of the named
24 defendants, the Court will simply have to read multiple briefs that likely will not help illuminate
25 the issues beyond what the original parties can provide. Accordingly, permissive intervention
26 should be denied.

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1 **CONCLUSION**

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3 For the foregoing reasons, Plaintiff CDTOA respectfully submits that the motion to
4 intervene should be denied.

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6 THE LAW OFFICES OF BROOKS ELLISON

7 Dated: April 21, 2011

8 /s/ Patrick J. Whalen

9 PATRICK J. WHALEN

10 Attorneys for Plaintiff
11 CALIFORNIA DUMP TRUCK OWNERS
12 ASSOCIATION
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