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*EXEMPT FROM FILING FEES
 PER GOV. CODE, § 6103*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 COUNTY OF LOS ANGELES, CENTRAL DISTRICT
 11 SPRING STREET COURTHOUSE

13 **SANTA BARBARA CHANNELKEEPER, a**
 14 **California non-profit corporation,**

Case No. 19STCP01176

15 Petitioner,

**NOTICE OF MOTION AND MOTION
 TO INTERVENE BY CALIFORNIA
 DEPARTMENT OF FISH AND
 WILDLIFE**

16 v.

Date: December 6, 2019
 Time: 10:00 a.m.
 Dept: 10
 Judge: William F. Highberger
 Trial Date: None Set
 Action Filed: September 19, 2014

17 **STATE WATER RESOURCES CONTROL**
 18 **BOARD, a California State Agency, CITY**
 19 **OF BUENAVENTURA, a California**
 20 **municipal corporation,**

Respondents.

21 **CITY OF SAN BUENAVENTURA, a**
 22 **California municipal corporation,**

23 Cross-Complainant,

24 v.

25 **DUNCAN ABBOTT, an individual; et al.,**

26 Cross-Defendants.
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NOTICE OF MOTION AND MOTION

TO THE COURT AND THE PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that respondent California Department of Fish and Wildlife hereby moves to intervene on the cross-complaint in this action and that that motion has been set for hearing on December 6, 2019 at 10 a.m., or as soon thereafter as the matter may be heard, in Department 10 of the above-entitled court, located at 312 North Spring Street, Los Angeles, California. This motion is based on this notice, the accompanying memorandum of points and authorities, and any other matter submitted on reply or at the hearing on matter.

Dated: November 4, 2019

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
ERIC M. KATZ
Supervising Deputy Attorney General



NOAH GOLDEN-KRASNER
Deputy Attorney General
*Attorneys for Proposed Intervenor
California Department of Fish & Wildlife*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The California Department of Fish and Wildlife (Department) seeks to intervene in the City
4 of Buena Ventura’s (City) second amended cross-complaint, which has initiated a comprehensive
5 adjudication of water rights in the Ventura River basin. The Department’s interest in this case is
6 to ensure that any interim or final adjudication of water rights is consistent with the instream flow
7 needs for fish and other surface flow dependent plants and wildlife, as well as that groundwater
8 levels be maintained to sufficiently protect groundwater dependent ecosystems. The Department
9 has met and conferred informally with attorneys for all parties who have appeared in this case,
10 and no one has voiced an objection to the granting of this motion.

11 **PROCEDURAL BACKGROUND**

12 In September 2014, Santa Barbara Channelkeeper (Channelkeeper) filed a Complaint and
13 Petition for Declaratory Relief and a Writ of Mandate pursuant to Code of Civil Procedure section
14 1085 against the City and the State Water Resources Control Board (State Board). The Petition
15 asked the Court to declare the City’s use of Reach 4 of the Ventura River from April through
16 October is unreasonable, in violation of article X, section 2 of the California Constitution, and to
17 direct the State Board to perform alleged mandatory duties under article X, section 2, Water Code
18 section 275, and the public trust doctrine to prevent that unreasonable use.

19 In response, the City filed a Cross-Complaint, and later a First Amended Cross-
20 Complaint, against other surface water and groundwater users who it alleged affect the flow of
21 water in the Ventura River. Pursuant to Channelkeeper’s motion, the Court struck City’s First
22 Amended Cross-Complaint. The City appealed the decision to strike its First Amended Cross-
23 Complaint, and the Court of Appeal reversed the decision in a published decision. (*Santa Barbara*
24 *Channelkeeper v. City of San Buena Ventura* (2018) 19 Cal.App.5th 1176.) Following the appeal,
25 Channelkeeper filed a First Amended Complaint and Petition (“1st Am. Complaint”). The State
26 Board’s Answer to the original Complaint and Petition was deemed its answer to the 1st Am.
27 Complaint. The City filed an Answer and a Second Amended Cross-Complaint (“2nd Am.
28 Cross-Complaint”).

1 In its 2nd Am. Cross-Complaint, City named approximately one hundred Cross-
2 Defendants who divert water from the Ventura River or pump groundwater from the Upper
3 Ventura River, Ojai Valley, Lower Ventura River, and Upper Ojai Valley Groundwater Basins
4 (collectively “Ventura Groundwater Basins”), which it contends affect the flow of water in the
5 Ventura River. The City’s 2nd Am. Cross-Complaint alleges the following claims: (1) violation
6 of reasonable use under Article X, section 2 by Cross-Defendants; (2) violation of public trust by
7 Cross-Defendants; (3) declaratory relief regarding pueblo and/or treaty water rights;
8 (4) declaratory relief regarding prescriptive water rights; (5) declaratory relief regarding
9 appropriative water rights; (6) comprehensive adjudication and physical solution; (7) declaratory
10 relief regarding municipal priority; (8) declaratory relief regarding human right to water; and
11 (9) declaratory relief. As an adjudication action that includes adjudication of the Ventura
12 Groundwater Basins, the 2nd Am. Cross-Complaint involves, among other things, the
13 Streamlined Groundwater Adjudication Statutes (Code Civ. Proc., §§ 830-852) and the
14 Sustainable Groundwater Management Act (SGMA) (Wat. Code, §§ 10720-10737.8).

15 Most Cross-Defendants have not filed responsive pleadings pursuant to an extension of
16 time granted by the San Francisco Superior Court allowing them to respond to the 2nd Am.
17 Cross-Complaint within 60 days after receipt of a Court-approved Form Answer.

18 Although originally venued in San Francisco County Superior Court, the case has been
19 transferred to Los Angeles County Superior Court. The case has been deemed complex and was
20 assigned to this department on May 15, 2019. This court ordered a partial stay of the action on
21 August 23, 2019 and no trial date has been set. The City’s motion for approval of its notice is to
22 come for hearing on November 1, 2019. At that point, the City will have a period of time to serve
23 the potential cross-defendants. (Code Civ. Proc., § 836, subd. (d).) The City has not yet provided
24 the statutory notice to all potential parties, and no due date for responsive pleadings has been
25 scheduled. The City has recently indicated an intent to obtain the court’s approval to file a Third
26 Amended Cross-Complaint.

27
28

1 **ARGUMENT**

2 Code of Civil Procedure section 387(d)(1) provides that a nonparty may intervene as a
3 matter of right upon timely application when a provision of law confers an unconditional right to
4 intervene. The Department arguably has a statutory right to intervene as a state agency. (See
5 Code Civ. Proc., §§ 835, subd. (a)(6), 837.5.) A nonparty may also intervene as a matter of right
6 upon timely application when (1) the proposed intervenor has an interest relating to the property
7 or transaction that is the subject of the action; (2) the disposition of this case may as a practical
8 matter impair or impede the proposed intervenor’s ability to protect that interest; and (3) the
9 proposed intervenor’s interests are not adequately represented by the existing parties. (Code Civ.
10 Proc., § 387, subd. (d)(1); see also, *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th
11 383, 386.) The Department meets each of these elements, and therefore is entitled to intervene as
12 a matter of right on this basis as well.

13 In the alternative, the Court may permit intervention under section 387(d)(2) when “(1) the
14 proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the
15 action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the
16 intervention outweigh any opposition by the parties presently in the action.” (*Reliance Ins. Co.*,
17 *supra*, 84 Cal.App.4th at 386, citing *Truck Ins. Exchange v. Superior Court* (1997) 60
18 Cal.App.4th 342, 346.) Should the court find that the Department is not entitled to intervene as a
19 matter of right, it should exercise its discretion to allow the Department to intervene by
20 permission.

21 **I. THE DEPARTMENT IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT**

22 **A. Intervention Is Timely**

23 This case is still in its infancy stages of litigation. The vast majority of water producers and
24 potential defendants in this case have not been served and the case is not yet at issue. In fact, this
25 case was reassigned to this court on May 15, 2019. Although there have been Case Management
26 Conferences and other hearings in the case, no trial date has been set and formal discovery has
27 not commenced. Indeed, the City has expressed its interest in filing a Third Amended Complaint.
28 Moreover, any delay, if there were one, is outweighed “when a direct interest is demonstrated”

1 and there is no prejudice to the parties. (*Truck Ins. Exchange v. Super. Ct.* (1997) 60 Cal.App.4th
2 341, 352.) As such, intervention is timely.

3 **B. The Streamlined Groundwater Adjudication Statute Confers on the**
4 **Department an Unconditional Right to Intervene**

5 The Streamlined Groundwater Adjudication Statutes provide that the plaintiff (here, the
6 City) is required to give notice of this comprehensive adjudication to the Department, as well as
7 the Attorney General, the Department of Water Resources, and the State Water Board. (Code
8 Civ. Proc., § 835, subd. (a)(6).) The statutes also provide that “the state” may intervene in a
9 comprehensive adjudication. (*Id.*, § 837.5.) The Code of Civil Procedure provides that a
10 nonparty must be allowed to intervene when a statute confers an unconditional right to intervene.
11 (Code Civ. Proc., § 387, subd. (d)(1)(A).) Given that the Streamlined Groundwater Adjudication
12 statutes require the plaintiff to give notice to the Department as a state agency, and that “the state”
13 is entitled to intervene as a matter of right, it is a fair reading of these statutes together to mean
14 that the Legislature intended that the state agencies who are given notice of a comprehensive
15 groundwater adjudication be allowed to intervene in such action as a matter of right. As such, the
16 Department should be allowed to intervene as a matter of right pursuant to Code of Civil
17 Procedure, section 387, subdivision (d)(1)(A).

18 **C. The Department Has a Right to Intervene to Protect Its Interests**

19 The Department may intervene as a matter of right under Code of Civil Procedure section
20 387(d)(1) as it meets the each the three elements: (1) the Department has an interest relating to the
21 property or transaction that is the subject of the action; (2) the disposition of this case may as a
22 practical matter impair or impede the Department’s ability to protect that interest; and (3) the
23 Department’s interests are not adequately represented by the existing parties. (Code Civ. Proc.,
24 § 387, subd. (d)(1).)

25 **1. The Department Has an Interest in the Adjudication and the Flow**
26 **Regime Ultimately Set for the Ventura River**

27 Although the Department is not a water producer and is not diverting any flows from the
28 Ventura River, the Department has a significant regulatory interest in the Ventura River and the

1 ultimate flow regime set for the river and its watershed. The Department also has been studying
2 the Ventura River watershed for several years in developing a recommended flow regime for the
3 Ventura River. Through these studies the Department has gained significant knowledge and
4 expertise relating to the flow regime that could be set for the Ventura River and the effects that
5 regime may have on the watershed's wildlife resources. Department staff also regularly deals
6 with questions of flow and its connections to resources and has the expertise and statutory
7 responsibility to protect those resources.

8 The Department has statutory responsibilities with regard to fish and wildlife resources,
9 including their habitats, in the State of California. (Fish & G. Code, §§ 711.7, 1802.) Further, the
10 Department has the authority to review projects for their potential impacts to threatened,
11 candidate, and endangered species and their habitats and may authorize the incidental taking of
12 these species through incidental take permits. (*Id.*, §§ 2080, 2081.) The Department also
13 regulates and permits activities that may substantially divert or obstruct the natural flow of, or
14 substantially change or use the material from the bed, channel, or bank of any river, stream, or
15 lake, or deposit debris, waste, or other materials where it could pass into any river, stream, or lake
16 through a Lake or Streambed Alteration Agreement. (*Id.*, § 1600 et seq.)

17 In addition, the Department has the responsibility to develop and transmit flow criteria to
18 the State Board for consideration as part of the State Board's instream flow program pursuant to
19 Public Resources Code section 10002. Finally, in 2014, Governor Brown signed the California
20 Water Action Plan which directs the Department and State Water Board to implement a suite of
21 actions designed to enhance instream flows in five priority watersheds, including the Ventura
22 River watershed.

23 Since the Department has regulatory and statutory responsibilities related to the Ventura
24 River and its fish and wildlife resources, and has the expertise and knowledge for how to protect
25 those resources, the Department has a clear interest related to this adjudication. This is further
26 supported by the requirement in the adjudication statute, California Code of Civil Procedure
27 section 835, to serve notice of the commencement of any adjudication upon the Department. The
28 Legislature found that the Department has an interest in every adjudication and required notice

1 upon the Department. This interest is even stronger in a case such as this, where the question at
2 issue is at the heart of the regulatory authority of the Department related to fish and wildlife
3 resources in the Ventura River watershed. In fact, the Department is tasked by the Legislature
4 and Governor to provide knowledge, expertise and advice regarding the watershed and take
5 action if necessary to protect the wildlife in the watershed.

6 **2. This Case's Disposition May Affect the Department's Interests.**

7 Intervention should also be granted as a matter of right because the disposition of this case
8 may, as a practical matter, impair or impede the interests of the Department. As the entity
9 responsible for protecting the fish and wildlife resources of the Ventura River and its watershed,
10 any final judgment related to the rights of the parties to pump or divert flow or groundwater in
11 this watershed will have a practical and possibly even a legal effect on how the Department
12 protects the resources at issue in this case. The flow regime agreed upon and the amount of
13 pumping permitted may exacerbate or alleviate the current impairment to the fish and wildlife
14 resources in the watershed. Setting sustainable flows and pumping coincides directly with the
15 Department's responsibilities under the Fish and Game and Public Resources Codes. Therefore,
16 it is hard to imagine a scenario where the final disposition of this case and the rights of the parties
17 to the action do not affect the Department's direct interests as overseer of the watershed's fish and
18 wildlife resources.

19 **3. The Department's Interests Are Not Adequately Represented By**
20 **Existing Parties**

21 The primary reason for this water rights adjudication case is to set all water rights for
22 existing and future pumpers from the Ventura River watershed. Therefore, existing and future
23 pumpers' first and foremost concern is their own individual water rights and access to water for
24 their own needs. The Department, however, has a very different interest at stake. As stated
25 above, the Department's interest is as the public's trustee to protect the fish and wildlife resources
26 of the Ventura River and its watershed. Although some of the parties to the case may have
27 concern for the fish and wildlife resources in mind, they cannot adequately represent the
28 Department and will necessarily have a conflict of interest involved in any plan to protect the

1 watershed and river's resources. The Department has been tasked by the State of California to
2 protect these resources and no existing party can adequately stand in its shoes and protect its
3 interests.

4 Based on the foregoing factors, the Department should be granted the right to intervene in
5 this action. The case is in its infancy, the Department has an interest in the adjudication which
6 may be affected by the disposition of the adjudication and there are currently no existing parties
7 that can adequately represent the Department.

8 **II. IN THE ALTERNATIVE, THE COURT SHOULD PERMIT INTERVENTION IN ITS**
9 **DISCRETION**

10 While the Department's right to intervene under section 387(d)(1) make analysis under
11 permissive intervention under section 387(d)(2) unnecessary, the Department nonetheless meets
12 the requirements for permissive intervention as well. The Department meets each of the four
13 necessary elements, discussed below.

14 **A. Proper Procedures Were Followed in Filing this Motion**

15 The Department has also followed all of the necessary procedural requirements for this
16 motion.

17 **B. The Department Has a Direct and Immediate Interest in This Action**

18 As discussed above, the Department has a clear interest in this litigation. The Department
19 has a significant regulatory interest in the Ventura River and the ultimate flow regime set for the
20 river and its watershed. The Department also has significant knowledge and expertise relating to
21 the flow regime that could be set for the Ventura River and the effects that regime may have on
22 the watershed's fish and wildlife resources. Department staff regularly deals with questions of
23 flow and its connections to resources and has the expertise and statutory responsibility to protect
24 those resources.

25 Further, the adjudication must as a practical matter engage in the issues surrounding the
26 flow regime of the Ventura River and the needs of the resources in the watershed. Any ultimate
27 adjudication of the rights to pump and divert water in the watershed must contend with these
28

1 competing needs and the Department is ideally placed to help resolve the competing needs and
2 avoid as much regulatory interference as possible in the future.

3 **C. The Department's Intervention Will Not Enlarge the Issues in the**
4 **Litigation**

5 The needs of fish and wildlife will need to be addressed in this litigation with or without the
6 Department, and so the Department's intervention to address them will not enlarge the issues in
7 this case. For example, a comprehensive adjudication is required to be "consistent with the
8 achievement of groundwater sustainability" under SGMA. (Code Civ. Proc., § 830, subd. (a)(4).)
9 Among other things, SGMA requires that groundwater be managed to avoid depletions of
10 interconnected surface water that have significant and unreasonable impacts on beneficial uses of
11 the surface water, such as providing necessary flow for fish. (Wat. Code, §§ 10720.1, subd. (a);
12 10721, subs. (v) & (x)(6).) Furthermore, groundwater management requires that the
13 "environmental users of groundwater" be considered. (*Id.*, § 10723.2, subd. (e).) Additionally,
14 surface water rights are conditioned on the effect appropriations have on fish and wildlife,
15 considering measures proposed to be taken to protect fish and wildlife. (E.g., *Id.*, § 1260, subd.
16 (j).) Finally, the public trust doctrine requires that all water right permits are subject to reopening
17 to consider the impacts that surface water diversions have on public trust resources, such as fish
18 and wildlife. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) For all these
19 reasons, the parties and the court will necessarily need to consider the needs of fish and wildlife
20 before resolving this case, and the Department's intervention in this case to address those issues
21 will therefore not enlarge the issues.

22 **D. The Reasons for the Department's Intervention Outweigh any Opposition**
23 **by the Parties**

24 The Department's reason for intervening are addressed extensively above. The Department
25 inquired of all the parties active in this case whether they oppose the Department's intervention,
26 and no party has voiced any opposition to the Department intervening in this action.
27
28

1 **III. THE DEPARTMENT REQUESTS THAT IT BE EXCUSED FROM FILING AND COMPLAINT**
2 **OR ANSWER IN INTERVENTION**

3 In a typical civil case, a motion to intervene must be accompanied by a complaint in
4 intervention or an answer in intervention. (Code Civ. Proc. § 387, subd. (c).) This is not a typical
5 civil case. The Legislature has employed highly unique procedural requirements for the naming
6 of parties and for how entities can participate in comprehensive groundwater adjudications like
7 this by filing court-approved form answers. (E.g., Code Civ. Proc., § 835.) Given the unique
8 procedural posture of this case and the Department's unique role in it, a complaint or answer is
9 intervention would not be meaningful or appropriate. The Department therefore requests that it
10 be relieved of the otherwise applicable requirement to file a complaint or answer in intervention.

11 **CONCLUSION**

12 The Department respectfully requests that its motion to intervene as a matter of right be
13 granted. In the alternative, it requests that it be allowed to intervene by permission.

14 Dated: November 4, 2019

Respectfully Submitted,

15
16 XAVIER BECERRA
Attorney General of California
17 ERIC M. KATZ
Supervising Deputy Attorney General

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19 

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