

1 SAGASER, JONES & HAHEYS
2 2445 Capitol Street, 2nd Floor
3 Post Office Box 1632
4 Fresno, California 93717-1632
5 Telephone: (559) 233-4800
6 Timothy Jones #119841

7 KIRKLAND & ELLIS LLP
8 655 15th Street, N.W., Suite 1200
9 Washington, D.C. 20005
10 Telephone: (202) 879-5000

11 Stuart A.C. Drake (*pro hac vice*)
12 Andrew B. Clubok (*pro hac vice*)
13 Granta Y. Nakayama (*pro hac vice*)
14 Eric B. Wolff #197147

15 Attorneys for all plaintiffs

16 **UNITED STATES DISTRICT COURT**

17 **EASTERN DISTRICT OF CALIFORNIA – FRESNO**

18 CENTRAL VALLEY CHRYSLER-JEEP,
19 INC., KITAHARA PONTIAC GMC BUICK,
20 INC., MADERA FORD MERCURY, INC.,
21 MADERA CHEVROLET, FRONTIER
22 DODGE, INC., TOM FIELDS MOTORS, INC.,
23 PISTORESCHI CHRYSLER DODGE JEEP, BOB
24 WILLIAMS CHEVROLET, COURTESY
25 OLDSMOBILE CADILLAC, INC., MERLE
26 STONE CHEVROLET, INC., MERLE STONE
27 PORTERVILLE, INC., STURGEON AND
28 BECK INCORPORATED, SWANSON
FAHRNEY FORD, INC., GENERAL
MOTORS CORPORATION,
DAIMLERCHRYSLER CORPORATION,
TULARE COUNTY FARM BUREAU, and the
ALLIANCE OF AUTOMOBILE
MANUFACTURERS,

Plaintiffs,

v.

Catherine E. WITHERSPOON, in her official
capacity as Executive Officer of the California
Air Resources Board,

Defendant.

Case No. CIV-F-04-06663REC-LJO

**PLAINTIFFS' OPPOSITION TO
MOTIONS TO INTERVENE OF
SIERRA CLUB, NATURAL
RESOURCES DEFENSE COUNCIL,
ENVIRONMENTAL DEFENSE,
BLUEWATER NETWORK, GLOBAL
EXCHANGE, AND RAINFOREST
ACTION NETWORK**

Date: June 13, 2005

Time: 1:30 p.m.

Courtroom: One

Honorable Robert E. Coyle

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	3
I. The Applicants’ Interests Are Adequately Represented By Defendant.	3
A. The Purported Additional Arguments And Divergence Of Interests Cited By The Applicants Do Not Support Intervention.	3
B. Nothing In <i>Southwest Center for Biological Diversity v. Berg</i> Alters Ninth Circuit Precedent With Respect To The Adequacy Of Representation In This Case.....	7
II. Applicants Should Not Be Granted Permissive Intervention Because Their Participation As Parties Is Not Necessary And Will Burden The Court And The Parties.....	9
CONCLUSION.....	12

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Am. S.S. Owners Mut. Prot. & Indem. Ass’n, Inc. v. Alcoa S.S. Co.,
No. 04Civ.4309LAKFM, 2005 WL 427593, *11 (S.D.N.Y. Feb. 22, 2005) 10

Arakaki v. Cayetano,
324 F.3d 1078 (9th Cir. 2003) 2, 3

Central Valley Chrysler Plymouth, Inc., et al. v. California Air Resources Board,
No. CV-F-O2-5017 E.D. Cal., Oct. 8, 2002) 1, 11

City of Los Angeles v. NHTSA,
912 F.2d 478 (D.C. Cir. 1990) 6

Coburn v. DaimlerChrysler Servs. N.A., L.L.C.,
218 F.R.D. 607 (N.D. Ill. 2003) 10

Didrickson v. United States Dep’t of the Interior,
982 F.2d 1332 (9th Cir. 1992) 10

Donnelly v. Glickman,
159 F.3d 405 (9th Cir. 1998) 9

Forest Conservation Council v. United States Forest Serv.,
66 F.3d 1489 (9th Cir. 1995) 3

Haw. Newspaper Agency v. Bronster,
103 F.3d 742 (9th Cir. 1996) 6

Hotel Employees & Rest. Employees Int’l Union v. Nev. Gaming Comm’n,
984 F.2d 1507 (9th Cir. 1993) 7

Idaho Farm Bureau Federation v. Babbitt,
58 F.3d 1392 (9th Cir. 1995) 7

In re Bank of N.Y. Derivative Litig.,
320 F.3d 291 (2d Cir. 2003) 10

Kootenai Tribe of Idaho v. Veneman,
313 F.3d 1094 (9th Cir. 2002) 10

League of United Latin Am. Citizens v. Wilson,
131 F.3d 1297 (9th Cir. 1997) 4, 7

1	<i>McDonald v. Means</i> ,	
	309 F.3d 530 (9th Cir. 2002)	9
2	<i>Northwest Forest Res. Council v. Glickman</i> ,	
3	82 F.3d 825 (9th Cir. 1996)	3, 8
4	<i>Rapp v. Cameron</i> ,	
5	No. Civ. A. 00-13762001 WL 1295606, *3	
6	(E.D. Pa. Oct. 18, 2001).....	10
7	<i>Sagebrush Rebellion, Inc. v. Watt</i> ,	
	713 F.2d 525 (9th Cir. 1983)	7
8	<i>San Jose Mercury News v. United States Dist. Ct.</i> ,	
9	187 F.3d 1096 (9th Cir. 1999)	9
10	<i>Sayles Hydro Assocs. v. Maughan</i> ,	
11	985 F.2d 451 (9th Cir. 1993)	6
12	<i>Southwest Center for Biological Diversity v. Berg</i>	
	268 F.3d 810 (9th Cir. 2001)	7, 8, 9
13	<i>United States v. City of Los Angeles</i> ,	
14	288 F.3d 391 (9th Cir. 2002)	passim
15	<i>United States v. Duke Energy Corp.</i> ,	
16	171 F. Supp. 2d 560 (M.D.N.C. 2001)	10
17	<i>Van Hoomissen v. Xerox Corp.</i> ,	
18	497 F.2d 180 (9th Cir. 1974)	10
19	Statutes	
20	Energy Policy and Conservation Act of 1975,	
	49 U.S.C. § 32919(a)	1
21	Rules	
22	Fed. R. Civ. P. 24.....	passim
23	Other Authorities	
24	Wright, Miller et al., FEDERAL PRACTICE & PROCEDURE § 1922 (2005)	10
25	Wright, Miller et al., FEDERAL PRACTICE AND PROCEDURE § 1909 (1986).....	3
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRELIMINARY STATEMENT

The central question in this case is whether the carbon dioxide emissions standards approved by the California Air Resources Board (“CARB”) on September 24, 2004, are preempted by federal law. This is a straightforward issue governed by specific federal statutes. One of the most important of those statutes is the Energy Policy and Conservation Act of 1975 (“EPCA”). EPCA provides that no state, including California, may adopt or enforce any law or regulation “related to fuel economy standards.” 49 U.S.C. § 32919(a). The primary claim in this action based on EPCA can be simply stated as follows: (1) CARB’s new carbon dioxide standards regulate fuel economy, (2) CARB’s standards are therefore “related to fuel economy standards,” and (3) as a result, CARB’s standards are preempted.

Similar issues under the fuel economy law were presented in earlier litigation in this Court. *Central Valley Chrysler Plymouth, Inc., et al. v. California Air Resources Board*, No. CV-F-O2-5017 (“*Central Valley v. CARB*”). In *Central Valley v. CARB*, a motion to intervene in support of the State was filed by the Natural Resources Defense Council (“NRDC”) and the Production Electric Vehicle Drivers Coalition. In a Memorandum Order issued in October 2002, the Court concluded that “the applicants have not demonstrated that [the Executive Officer of CARB] will not adequately represent their interests in this litigation,” because “the applicants have the same objectives as [the Executive Officer] in this litigation, *i.e.*, that the regulations are lawful.”¹

The governing case law under Rule 24 of the Federal Rules of Civil Procedure is largely unchanged since 2002. The basic alignment of interests and objectives of the State and its supporters is also virtually the same as in the prior litigation. Nevertheless, two separate applications for intervention have been filed to support the State’s position in this case. In addition to NRDC, those applicants include the Sierra Club, Environmental Defense, Bluewater

¹ See Order, *Central Valley Chrysler Plymouth, Inc. v. California Air Resources Board*, No. CV-F-O2-5017, at 8-9 (E.D. Cal., Oct. 8, 2002) (“Order”); Plaintiffs’ Request for Judicial Notice in Opposition to Motions to Intervene (“Plaintiffs’ Intervention RJN”) Exhibit 1 at 8-9.

1 Network, Global Exchange, and Rainforest Action Network.² Their intervention motions should
2 be denied, for the reasons summarized here and then detailed below in the balance of this
3 Memorandum.

4 1. Under Ninth Circuit precedent, the defendant in this action -- represented by the
5 Attorney General -- is a presumptively adequate representative of the interests of any applicant
6 for intervention sharing the same ultimate objective as defendant. The applicants for status as
7 party-defendants in this case have not remotely made the “very compelling showing” necessary
8 to overcome that presumption. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)
9 (quotation omitted). The Bluewater Applicants identify a single argument that they wish to
10 advance, which they claim defendant might overlook or omit. The Sierra Club Applicants assert
11 that they also wish to advance “at least one major dispositive argument” that they claim
12 defendant will not make, Sierra Club Motion at 9, but they have thus far chosen not to advise the
13 Court or plaintiffs of the substance of that argument. There is no “secret argument” exception to
14 the presumption that the government is an adequate representative, and mere disagreements over
15 litigation strategy or legal tactics do not make an existing party an inadequate representative of a
16 proposed intervenor’s interest. *See, e.g., United States v. City of Los Angeles*, 288 F.3d 391,
17 402-03 (9th Cir. 2002).

18 2. Participation by the Sierra Club Applicants and the Bluewater Applicants will
19 unnecessarily complicate the proceedings and burden both the Court and the existing parties.
20 Aside from potentially tripling the number of briefs in support of CARB’s rule, there is also the
21 issue of protecting confidential business information, including the declarations that have been
22 filed under seal pursuant to this Court’s order in connection with defendant’s motion to dismiss
23 or transfer the action. If admitted as parties, Applicants may try to claim that party status entitles
24 them to obtain access to the financial records and product plans of the plaintiffs and other

25 ² The Motion for Leave to Intervene of the Sierra Club, Natural Resources Defense Council, and
26 Environmental Defense, filed February 3, 2005, is hereinafter referred to as the motion of the
27 “Sierra Club Applicants” or the “Sierra Club Motion.” The Motion for Leave to Intervene of
28 Bluewater Network, Global Exchange and Rainforest Action Network, filed February 18, 2005,
is hereinafter referred to as the motion of the “Bluewater Applicants” or “Bluewater Motion.”

1 businesses. Such disclosures would not advance the progress of this litigation, and plaintiffs are
2 not aware of any mechanism, including a Protective Order, that would adequately protect their
3 confidential information if the Applicants were given access to it.

4 **ARGUMENT**

5 **I. The Applicants’ Interests Are Adequately Represented By Defendant.**

6 Federal Rule of Civil Procedure 24(a) does not permit intervention as of right if “the
7 movant’s interest is adequately represented by existing parties.” Under well-established Ninth
8 Circuit precedent, the Sierra Club and Bluewater Applicants’ interests are adequately
9 represented by defendant.

10 **A. The Purported Additional Arguments And Divergence Of Interests Cited By** 11 **The Applicants Do Not Support Intervention.**

12 A “prospective intervenor bears the burden of demonstrating that existing parties do not
13 adequately represent its interests.” *City of Los Angeles*, 288 F.3d at 398. A “presumption of
14 adequate representation generally arises when the representative is a governmental body or
15 officer charged by law with representing the interests of the absentee.” *Forest Conservation*
16 *Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (quotation omitted).
17 That presumption applies in this case because the defendant is the Executive Officer of CARB,
18 represented by the California Attorney General.³

19 Further, “[w]here an applicant for intervention and an existing party have the same
20 ultimate objective, [another] presumption of adequacy of representation arises.” *Northwest*
21 *Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (internal quotation omitted).
22 As the Ninth Circuit has recently emphasized, where proposed intervenors have the same
23 objectives as an existing government party, a “very compelling showing” is required to
24 overcome the presumption that the government is an adequate representative. *Arakaki*, 324 F.3d
25 at 1086 (quoting Wright, Miller et al., FEDERAL PRACTICE AND PROCEDURE § 1909, at 318
26 (1986)); *see also* Wright, Miller et al., FEDERAL PRACTICE AND PROCEDURE § 1909, at 325

27 ³ A similar presumption would not apply, of course, to parties seeking intervention in support of
28 a party not represented by the Attorney General or the State.

1 (2005). Differences in litigation strategy do not suffice. *See City of Los Angeles*, 288 F.3d at
2 402-03; *see also League of United Latin Am. Citizens v. Wilson* (“LULAC”), 131 F.3d 1297,
3 1306 (9th Cir. 1997) (“disagreement over litigation strategy or legal tactics” is not a basis “to
4 accord the movant full-party status.”). Nor does any suggestion that proposed intervenors will
5 be more aggressive than the government. As the Ninth Circuit noted in a previous federal
6 challenge to a California law, when a state government demonstrates itself a “forceful, persistent,
7 and proactive support[er]” that has “vigorously defended” the state law at issue, “there is simply
8 no reason to believe ... that [the state government] cannot be counted on to argue vehemently in
9 favor of the constitutionality of [the state law].” *LULAC*, 131 F.3d at 1305-06 (internal
10 quotations & citation omitted).

11 The Sierra Club and Bluewater Applicants have not made the “very compelling showing”
12 necessary to carry their burden of demonstrating that the Executive Officer of CARB is not an
13 adequate representative of their interests. The Sierra Club Applicants state that “they will be
14 making at least one major dispositive argument in defense of the [CARB] regulations that CARB
15 will not be making.” Sierra Club Motion at 9. They do not reveal the “major dispositive
16 argument,” so there is no way to assess its significance. Even if Sierra Club Applicants were to
17 reveal the “major dispositive argument,” it could not amount to anything other than a difference
18 in litigation tactics. They admit their ultimate objective is no different from that of Defendant.
19 *See* Declaration of Bill Magavern in Support of Sierra Club Motion ¶ 10 (stating that Sierra
20 Club’s objective is “to ensure that these regulations are not overturned”); Declaration of Roland
21 J. Hwang in Support of Sierra Club Motion ¶ 8 (stating that Natural Resource Defense Council’s
22 objective is “to ensure that such standards are not overturned”).

23 The Bluewater Applicants’ similarly assert that “they are the only parties that will make
24 an additional, critical argument.” Bluewater Motion at 11. The Bluewater Applicants, unlike the
25 Sierra Club Applicants, at least identify the particular argument.⁴ Bluewater offers no grounds

26 ⁴ The Bluewater Applicants apparently wish to argue that it is likely (and legally relevant) that
27 some manufacturers would not have to reduce the fuel consumption of some vehicles, if those
28 vehicles were powered by electricity. *See* Bluewater Motion at 11. The legal relevance of the
Bluewater Applicants’ theory is obscure and it lacks any technical merit. *See* Declaration of

1 to conclude that the State will not make any argument that would have any weight in defense of
2 CARB's rule. In any event, a difference in litigation tactics does not constitute inadequate
3 representation by the government. *City of Los Angeles*, 288 F.3d at 402-03. Like the Sierra
4 Club Applicants, the Bluewater Applicants have the same ultimate objective as the government.
5 See Declaration of Russell Long in Support of Bluewater Motion ¶ 22 (stating that Bluewater
6 Network's interest is "in ensuring that the AB 1493 regulations survive legal challenge and
7 become governing law"); Declaration of Michael Brune in Support of Bluewater Motion ¶ 11
8 (stating that Rainforest Action Network's interest is "in ensuring that the AB 1493 regulations
9 survive legal challenge and become governing law"); Declaration of Jason Mark in Support of
10 Bluewater Motion ¶ 8 (stating that Global Action's interest is "in ensuring that the AB 1493
11 regulations survive legal challenge and become governing law").

12 To the extent the Sierra Club and Bluewater Applicants assert any interests that differ
13 from defendant (which, to be sure, is not a difference in ultimate objectives), even the cited
14 differences in interests are illusory. For example, the Sierra Club Applicants assert that they
15 have a "strong interest in protecting resources outside California on the national level," and that
16 CARB is not "vitaly concerned" about such matters. Sierra Club Motion at 10. That assertion
17 does not square with CARB's actions. CARB has not only expressed its interest in the Northeast
18 States and other countries adopting its standards,⁵ but CARB officials even met with officials of
19 the Canadian government in an (ultimately unsuccessful) attempt to persuade Canada to adopt
20 CARB's standards. First Amended Complaint ¶ 70. CARB has demonstrated both a national
21
22
23
24
25

26 Thomas C. Austin in Support of Plaintiffs' Opposition to Motion to Dismiss or Transfer (filed
27 May 2, 2005), Appendix B at 18-20.

28 ⁵ See Plaintiffs' Intervention RJN Exhibit 2 at p. 81.

1 and international interest.⁶ Moreover, even if such a difference existed, Applicants do not
2 explain how such a difference in interests would affect the litigation. Bluewater Applicants’
3 alleged divergence in interests fails for the same reason. Bluewater notes that CARB must “take
4 into account ... the effect of its activities on the regulated community, budgetary restraints, and
5 political concerns,” *See* Bluewater Motion at 9-10, but Bluewater fails to offer the slightest
6 explanation as to how CARB’s consideration of those factors during its *rulemaking* impacts
7 CARB’s defense of the regulations that were adopted on September 24, 2004, and that both
8 CARB and the Applicants wish to see upheld.

9 The Sierra Club Applicants further state that they possess “expertise” that in some
10 unexplained manner sets them apart from CARB. That representation is belied by one of their
11 own declarations, in which a spokesperson for Environmental Defense extols the “technical
12 expertise of [CARB’s] agency staff” and declares that “California has the most sophisticated air
13 resources agency in the U.S.” *See* Declaration of James Marston in Support of Sierra Club
14 Motion at ¶¶ 5-6. Even if it were true that the Sierra Club Applicants had even more expertise
15 than CARB, they do not explain how such expertise would create a divergence of interests
16 affecting the presentation of arguments in a case involving federal preemption, where the issues
17 are predominantly legal. *See Haw. Newspaper Agency v. Bronster*, 103 F.3d 742, 746 (9th Cir.
18 1996) (“[T]he issue of whether a federal law ‘occupies the field and thereby preempts state law
19 is purely legal’”) (quoting *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 454 (9th Cir. 1993));
20 *Hotel Employees & Rest. Employees Int’l Union v. Nev. Gaming Comm’n*, 984 F.2d 1507, 1513

21
22 ⁶ In proclaiming their “national interest,” the Sierra Club Applicants erroneously state that “the
23 federal government has refused to regulate greenhouse gas emissions from cars.” Sierra Club
24 Motion at 10. As the Sierra Club Applicants are surely aware, the federal government’s
25 longstanding regulation of motor vehicle fuel economy under EPCA has controlled the carbon
26 dioxide emitted by motor vehicles. The average car sold today has much lower levels of fuel
27 consumption, and therefore releases far less carbon dioxide, than the average car sold before
28 adoption of EPCA. Certainly, the Sierra Club Applicants cannot deny the link between fuel
economy regulation and carbon dioxide regulation. NRDC has advocated in support of increases
in the EPCA fuel economy standards as a mechanism to address climate change. *See City of Los
Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990).

1 (9th Cir. 1993) (“Preemption is predominantly a legal question, resolution of which would not be
2 aided greatly by development of a more complete factual record.”).

3 None of the Applicants are in a position remotely comparable to that of the intervenors in
4 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983). *Cf.* Sierra Club Motion at 10.
5 In that case Interior Secretary Watt was in the position of defending regulatory action that, prior
6 to his confirmation as Secretary of Interior, had been challenged by the organization he used to
7 lead (the Mountain States Legal Foundation). As the Ninth Circuit noted, the case could have
8 been captioned “*Watt v. Watt*.” *Id.* at 528. Similarly, in *Idaho Farm Bureau Federation v.*
9 *Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995), an environmentalist organization was allowed to
10 intervene to support agency action where the agency had only acted because of that
11 organization’s prior lawsuit.

12 Unlike the situation in *Sagebrush Rebellion*, CARB has been aggressive and undeterred
13 in its desire to regulate fuel economy, and the government certainly appears ready to mount a
14 vigorous defense of its rules without any external prompting. The Sierra Club and Bluewater
15 Applicants offer no credible basis for believing that defendant has not been armed with any
16 available defense to the greenhouse gas rule.⁷

17 **B. Nothing In *Southwest Center for Biological Diversity v. Berg* Alters Ninth**
18 **Circuit Precedent With Respect To The Adequacy Of Representation In This**
19 **Case.**

20 Though it is well-settled in the Ninth Circuit that differences in litigation tactics will not
21 suffice to demonstrate inadequate representation, *see City of Los Angeles*, 288 F.3d at 402-03;
22 *LULAC*, 131 F.3d at 1306, Applicants assert that the Ninth Circuit “held” in *Southwest Center*
23 *for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001), that proposed intervenors are
24 inadequately represented if “it is likely that Defendants will not advance the same arguments as
25 Applicants.” Sierra Club Motion at 9-10; Bluewater Motion at 9. Such a purported “holding”

26 ⁷ CARB has dedicated substantial resources to this case. For example, in connection with its
27 briefing on its motion to dismiss or transfer this action, counsel for the government has requested
28 that up to 10 members of the CARB staff be granted access to the confidential business
information contained in documents filed under seal by plaintiffs earlier this month.

1 would require overturning Circuit precedent, and *Southwest Center* plainly held no such thing.
2 *Southwest Center* turned upon an obvious divergence of interests and objectives between the
3 intervenors and the City of San Diego. Because the Sierra Club and Bluewater Applicants’
4 motions appear to rely heavily upon their mischaracterization of *Southwest Center*, a detailed
5 explanation is warranted.

6 *Southwest Center* involved a challenge by environmentalists to an “incidental take
7 permit” issued by the United States Fish and Wildlife Service under the Endangered Species Act
8 to the City of San Diego and the California Department of Fish and Game. The permit
9 incorporated a habitat conservation plan developed by numerous cities and stakeholders within
10 San Diego County, and the permit authorized the grant of “third-party beneficiary” status to
11 particular stakeholders, including developers. The proposed intervenors were a developer and
12 four associations of developers that had participated in the process leading up to the permit, who
13 were regulated by the permit, and who were “third-party beneficiaries” of the permit’s protection
14 against Endangered Species Act liability if a “take” of an endangered species were to occur. The
15 environmentalist plaintiffs argued that the City of San Diego adequately represented the
16 developers. The Ninth Circuit did not even find that a presumption of adequate representation
17 arose: “There is some question whether the presumption of adequacy applies at all here because
18 complexity makes the determination of an ‘ultimate objective’ in this case more difficult than in
19 *NFRC [Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 838 (9th Cir.1996)].”*
20 *Southwest Center*, 268 F.3d at 823. The Ninth Circuit then went on to explain why the
21 divergence of interests between the developers and the City of San Diego demonstrated that the
22 City was not an adequate representative:

23 [E]ven if the presumption applies, it is rebutted here because Applicants and
24 Defendants *do not have sufficiently congruent interests*. While the City states
25 that it believes it shares with Applicants the same ‘ultimate objective’ in the
26 preservation of the [development plan] and [incidental take permit], the City itself
27 notes two ways in which those interests might diverge: (1) the City’s range of
28 considerations in development is broader than the profit-motives animating
developers; and (2) developers have different duties under the Plans relating to
mitigation.

1 *Id.* at 823 (emphasis added). That statement of divergent interests is the holding of *Southwest*
2 *Center* with respect to adequacy of representation. The Court then went on to note serious flaws
3 in the district court’s basis for denying intervention, namely, the district court’s speculation that
4 the City of San Diego would present the same arguments as proposed intervenors wished to
5 make. Again, the Court emphasized that a divergence of interests was the crucial issue: “[i]t is
6 sufficient for Applicants to show that, *because of the difference in interests*, it is likely that
7 Defendants will not advance the same arguments as Applicants.” *Id.* at 824 (emphasis added).

8 In no way does *Southwest Center* support the Sierra Club or Bluewater Applicants. The
9 Applicants are not a regulated party like the developers in *Southwest Center*, they admit they
10 have the same ultimate objective as defendant, and they cannot and have not asserted that
11 *because of a credible difference in interests* they are likely to make different arguments. Indeed,
12 as discussed above, there are no credible differences in interests cited by the Sierra Club and
13 Bluewater Applicants, and given the recent history of litigation over these preemption issues
14 which is familiar to this Court, it is even less credible that defendant will omit any worthy
15 defense for her regulation.

16 **II. Applicants Should Not Be Granted Permissive Intervention Because Their**
17 **Participation As Parties Is Not Necessary And Will Burden The Court And The**
18 **Parties.**

19 “The decision to deny permissive intervention is ‘directed to the sound discretion of the
20 district court.’” *McDonald v. Means*, 309 F.3d 530, 541 n.11 (9th Cir. 2002) (quoting *San Jose*
21 *Mercury News v. United States Dist. Ct.*, 187 F.3d 1096, 1100 (9th Cir. 1999)). Federal Rule of
22 Civil Procedure 24(b)(2) sets forth threshold elements for permissive intervention, but “[e]ven if
23 an applicant satisfies those threshold requirements, the district court has discretion to deny
24 permissive intervention.” *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). “In
25 exercising its discretion, the district court must consider whether intervention will unduly delay
26 the main action or will unfairly prejudice the existing parties.” *Id.*

27 When intervention would lead to wasteful and complicated discovery disputes,
28 intervention may be denied. *See, e.g., Am. S.S. Owners Mut. Prot. & Indem. Ass’n, Inc. v. Alcoa*

1 S.S. Co., No. 04Civ.4309LAKFM, 2005 WL 427593, *11 (S.D.N.Y. Feb. 22, 2005); *Coburn v.*
2 *DaimlerChrysler Servs. N.A., L.L.C.*, 218 F.R.D. 607, 611 (N.D. Ill. 2003). It is also proper to
3 deny permissive intervention based upon substantially the same factors as denial of intervention
4 of right. See *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 n. 5 (2d Cir. 2003). In this
5 case, permissive intervention should be denied because the costs of permitting intervention by
6 the Applicants plainly outweigh any potential need by the Applicants to participate as parties,
7 and as discussed above, the Applicants are more than adequately represented by defendant.⁸

8 As an initial matter, allowing the Sierra Club Applicants and Bluewater Applicants to
9 intervene could triple the number of briefs in support of CARB on any given issue or motion.
10 Because the central issues are easily framed and many have been previously litigated, there is
11 likely to be substantial repetition. It is extremely unlikely that the Applicants need party status
12 in this litigation in order to add anything new or useful because CARB and its counsel here are
13 very familiar with the issues in this case.⁹

14
15
16 ⁸ Alternatively, “[s]ince the trial court has full discretion to grant or deny an application for
17 permissive intervention under Rule 24(b), it may if it chooses impose conditions on its grant of
18 the application.” Wright, Miller et al., FEDERAL PRACTICE & PROCEDURE § 1922 (2005). For
19 example, a district court may “limit intervention to particular issues.” *Van Hoomissen v. Xerox*
20 *Corp.*, 497 F.2d 180, 181 (9th Cir. 1974). A district court may also limit the intervenors’ right to
take discovery. See, e.g., *Rapp v. Cameron*, No. Civ. A. 00-13762001 WL 1295606, *3 (E.D.
21 Pa. Oct. 18, 2001); *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C.
2001).

22 ⁹ The only ground that might warrant the award of party status would be if there were some
23 doubt as to whether defendant would defend her regulation on appeal. See, e.g., *Kootenai Tribe*
24 *of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002). If such circumstances were to arise,
25 intervention could be addressed at that time. One of the issues at that time would be the
26 Applicants’ demonstration of Article III injury from any judgment adverse to defendant in order
27 to seek an appeal. See *Kootenai Tribe*, 313 F.3d at 1109 (“Before we address whether the
28 district court erred in granting intervention under Federal Rule of Civil Procedure 24(b), we must
first determine whether intervenors have Article III standing to pursue this appeal in defense of
the Roadless Rule without the government as an appellant, leaving intervenors as the only parties
on appeal adverse to plaintiffs.”); *Didrickson v. United States Dep’t of the Interior*, 982 F.2d
1332, 1337-38 (9th Cir. 1992).

1 There is also a substantial risk of disputes, undue delay, and prejudice to existing parties
2 if the Sierra Club or Bluewater Applicants try to use party status in order to obtain access to the
3 financial records and product plans of plaintiffs and the members of plaintiffs, including those
4 that have provided confidential business information under seal.¹⁰ Plaintiffs and defendant are
5 currently working on the terms of an appropriate proposed Protective Order to govern
6 defendant's access to and use of that confidential information.¹¹ Plaintiffs have sent defendant a
7 draft proposed Order based substantially on the Order entered by this Court in the *Central Valley*
8 *v. CARB* case in 2002. Plaintiffs believe that such an Order will protect their interests in
9 confidentiality, because the Order would limit access to the relevant confidential information to
10 State officials, who are accustomed to handling such information and maintaining its
11 confidentiality.

12 In contrast, plaintiffs do not believe that the confidential business information such as
13 that filed under seal should be made available to the Applicants or that a Protective Order would
14 provide adequate safeguards for the disclosure of such material to Applicants. For example, the
15 material filed under seal to date relates to such issues as manufacturers' product plans, lead-time
16 requirements, cost projections, and dealers' financial outlook. Although this information is
17 highly sensitive, plaintiffs recognize that defendant must have some access to it, with appropriate
18 court-ordered limitations. Defendant's motion to dismiss or transfer this action is based on
19 various assumptions about how the industry will respond to the A.B. 1493 regulations and how
20 CARB's rule affects the dealer plaintiffs and others. Defendant needs to be able to understand
21 how the facts contained in plaintiffs' confidential business information conflicts with her
22 assumptions. Applicants, on the other hand, are not involved in the motion to dismiss or
23 transfer, and have no compelling interest in access to confidential business information.

24
25 ¹⁰ See Declarations of Kelly M. Brown, John W. Gardner, Stuart Harden, Leonard Harrington,
26 Reginald R. Modlin, Gerald R. Pistorosi, Michael Rosvold, Brian Wells, Alan R. Weverstad,
and Karl-Heinz Ziwica, all filed under seal by Order dated May 3, 2005.

27 ¹¹ Pending completion of that proposed order, plaintiffs have authorized access to information
28 under a confidentiality agreement signed by counsel for defendant and CARB staff.

