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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF SACRAMENTO**

17 ALMOND ALLIANCE OF CALIFORNIA;
18 CALIFORNIA ASSOCIATION OF PEST
CONTROL ADVISERS;
19 CALIFORNIA CITRUS MUTUAL;
CALIFORNIA COTTON GINNERS AND
20 GROWERS ASSOCIATION;
CALIFORNIA FARM BUREAU
21 FEDERATION; WESTERN
AGRICULTURAL PROCESSORS
22 ASSOCIATION; and WESTERN GROWERS
ASSOCIATION,

23 Petitioners,

24 v.

25 CALIFORNIA FISH AND GAME
COMMISSION, a California Public Agency;
26 CALIFORNIA DEPARTMENT OF FISH
AND WILDLIFE, a California Public Agency,

27 Respondents.
28

Case No. 34-2019-80003216-CU-WM-GDS

**MOTION TO INTERVENE OF XERCES
SOCIETY FOR INVERTEBRATE
CONSERVATION, DEFENDERS OF
WILDLIFE, AND CENTER FOR FOOD
SAFETY**

Action Filed: September 9, 2019

1 **INTRODUCTION**

2 Bumble bees are integral to the healthy functioning of California ecosystems, but have been in
3 decline for years due to land use change, pesticide over-use, and disease spread by commercial bees.
4 Nonprofit conservation groups the Xerces Society for Invertebrate Conservation (“Xerces”),
5 Defenders of Wildlife (“Defenders”), and Center for Food Safety (“CFS”) conducted years of
6 research and spent months petitioning the California Fish and Game Commission to list the
7 Franklin’s, suckley cuckoo, crotch, and western bumble bees (“California Native Bees”) as
8 endangered under the California Endangered Species Act (“CESA”). The Fish and Game
9 Commission listed the bees as candidate species under CESA in June of 2019.

10 Xerces, Defenders, and CFS (“Applicants”) move to intervene in this action to defend both
11 their years-long efforts leading to the Fish and Game Commission’s listing decision and the
12 Commission’s broad authority to list insects under CESA. Applicants meet the criteria for both as-
13 of-right intervention and permissive intervention under California Code of Civil Procedure section
14 387. The purpose of section 387 is to “protect the interests of [those] who may be affected by [a]
15 judgement.” *People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d 655, 660 (1983).
16 Applicants’ mission to conserve imperiled species and ecosystems requires intervention to preserve
17 their right to seek CESA protections for insects. Moreover, Applicants have studied the California
18 Native Bees for decades and have been heavily involved in their CESA listing; intervention will
19 enable Applicants to protect this investment and assist the Court in understanding the science, law,
20 and procedural background of this case.

21 Through their counsel, Petitioners Almond Alliance of California, et al., and Respondents
22 California Fish and Game Commission and California Department of Fish and Wildlife have
23 indicated that they *do not oppose this motion*.

24 **BACKGROUND**

25 **I. Legal Background**

26 CESA’s purpose is “to conserve, protect, restore, and enhance any endangered species or
27 threatened species and its habitat.” California Fish & Game Code § 2052. In CESA, the Legislature
28 recognized that species conservation “is of statewide concern,” and that endangered and threatened

1 species are of “ecological, educational, historical, recreational, esthetic, economic, and scientific
2 value to the people” of California. *Id.* § 2051. Accordingly, CESA prohibits the sale, import, export,
3 and take of threatened and endangered species, and of candidates for listing. *Id.* §§ 2080, 2085.

4 CESA provides “interested person[s]” the right to petition the Fish and Game Commission
5 (“Commission”) to add or remove species from the endangered and threatened species list. Fish &
6 Game Code §§ 2070–2075.5. These listing petitions describe the species’ population trends, range,
7 and abundance; the types and the intensity of threats to the species; management suggestions; habitat
8 information; and any sources of data about the species. *Id.* § 2072.3; 14 California Code of
9 Regulations (“C.C.R.”) § 670.1(d). The Department of Fish and Wildlife (“Department”) evaluates
10 petitions and advises the Commission on whether to list the species. Fish & Game Code § 2073.5.
11 Any person may submit more information related to these factors for the Department’s consideration.
12 *Id.* § 2073.4. If the Commission accepts a petition for consideration after a public hearing, the
13 species described in it become “candidate species,” which the agencies further investigate to
14 determine if the species should be listed as threatened or endangered. *Id.* § 2074.4.

15 **II. Factual Background**

16 **A. Native Pollinators and the Demise of the California Native Bees**

17 Wild, native insects perform vital ecosystem services such as pollination, pest control, and
18 decomposition. John E. Losey, & Mace Vaughan, *The Economic Value of Ecological Services*
19 *Provided by Insects*, 56 *BioScience* 4, 311, at 311 (April 2006). These services are essential for
20 human activities, including food production and waste management, and have been estimated at \$57
21 billion in annual value to the United States. *Id.* Pollinating insects are key to the survival of wild and
22 cultivated plants: 85% of flowering plants and 35% of global food production rely on insect
23 pollinators, primarily bees. Xerces, Defenders, CFS Petition to List, at 6 (Oct. 17, 2018) (“Listing
24 Petition”).

25 Bumble bees are some of the most efficient pollinators. They begin pollinating earlier in the
26 year than other bees, and they perform “buzz pollination,” which is required for certain plants like
27 tomatoes, blueberries, and peppers to produce at full potential, and which managed honey bees are
28 unable to perform. Listing Petition at 23–24. Wild bees like the California Native Bees are

1 important to many of California’s crops, including tomatoes, peppers, melons, squash, cotton, and
2 almonds, and are key to many of California’s wild ecosystems. *Id.*; Jepsen Decl. ¶ 14.

3 Many insects are facing a precipitous decline in abundance and species diversity. Matthew L.
4 Forister, Emma M. Pelton, & Scott H. Black, *Declines in insect abundance and diversity: We know*
5 *enough to act now*, 1 Conservation Science and Practice 8, at 6 (June 22, 2019). Because insects play
6 such vital environmental roles, their dramatic decline threatens ecosystems and may lead to global
7 food shortages. *Id.* Without native pollinators, California’s diverse agricultural production and the
8 wild plants that form its most iconic landscapes like the Carrizo Plain may suffer from a pollination
9 shortage. Jepsen Decl. ¶ 14.

10 The California Native Bees are disappearing at an especially alarming rate. Pesticide use,
11 land use change, and commercial bee production threaten their survival. Listing Petition at 37. The
12 crotch bumble bee was once common to the southern two-thirds of California, but over the last ten
13 years its relative abundance and persistence have declined by 98% and 80% respectively. *Id.* at 9.
14 Franklin’s bumble bee has the most limited distribution of any bumble bee in North America and is in
15 imminent danger. *Id.* at 11–12. The western bumble bee is now present in half of its historic range,
16 and its relative abundance has declined by 84%; in California, its populations are mostly restricted to
17 high-elevation pockets in the Sierra Nevada Mountains. *Id.* at 17. Finally, the suckley cuckoo
18 bumble bee is considered critically endangered by the International Union for Conservation of Nature
19 (“IUCN”), and its range has been cut in half. *Id.* at 20, 64.

20 **B. Applicants’ Petition to Protect the California Native Bees under CESA**

21 Applicants monitor, study, and advocate for wildlife, including bumble bees, to protect them
22 from extinction. Jepsen Decl. ¶ 14; Delfino Decl. ¶¶ 12–13; Spector Decl. ¶¶ 3, 9. During their
23 monitoring over two decades, Xerces members and scientists tracked the California Native Bees and
24 noticed a marked decline in their occurrence and range. Jepsen Decl. ¶ 17. Alarmed by this decline,
25 Xerces partnered with Defenders and CFS, and together they prepared the 119-page Listing Petition
26 to the Commission to list the California Native Bees as endangered under CESA. *Id.* ¶ 19. While the
27 Department and the Commission considered the Listing Petition, Applicants continued studying the
28 California Native Bees and supplied additional findings to the agencies. *Id.* ¶ 20. During its

1 consideration, the Commission received a letter asserting that it lacked the authority to list the
2 California Native Bees or any insect under CESA. Letter from Paul Weiland, Nossaman LLP, to
3 Melissa Miller-Henson, Acting Dir., Comm’n of Fish and Game, 1 (October 25, 2018) (Exhibit A).
4 In response, Applicants submitted a memorandum to the Commission detailing the Commission’s
5 authority to protect any threatened insect or invertebrate. Mem. from Ben DeGolia, Environmental
6 Law Clinic, to Melissa Miller-Henson, Acting Dir., Comm’n of Fish and Game, 1–4 (May 30, 2019)
7 (Exhibit B). The Commission accepted the petition on June 12, 2019. Cal. Fish and Game Comm’n,
8 Notice of Findings (June 18, 2019). This acceptance designated the California Native Bees as
9 candidate species under CESA, immediately granting them the statute’s protections. *Id.*

10 On September 9, 2019, Almond Alliance of California, California Association of Pest Control
11 Advisers, California Citrus Mutual, California Cotton Ginners and Growers Association, California
12 Farm Bureau Federation, Western Agricultural Processors Association, Western Growers
13 Association, and The Wonderful Company LLC (“Almond Alliance”) filed a petition for writ of
14 mandate to challenge the Commission’s acceptance of Applicants’ Listing Petition on the grounds
15 that insects cannot be listed under CESA. Writ Pet. On October 4, 2019, Almond Alliance filed an
16 amended writ petition identical to the first petition except for the absence of The Wonderful
17 Company LLC. First Am. Writ Pet.

18 **III. Applicants’ Interests**

19 Applicants have numerous and substantial interests in defending the Commission’s decision
20 to list the California Native Bees under CESA. These interests include: (a) Applicants’ missions to
21 conserve wildlife, including insects; (b) the substantial time and resources Applicants invested in the
22 Listing Petition; (c) recreation and economic interests in the survival of California Native Bees; (d)
23 core interests in protecting insects through CESA specifically; and (e) reputational interests in
24 completing the Applicants’ campaign to save the California Native Bees.

25 **A. Missions and Advocacy Interest**

26 **1. The Xerces Society for Invertebrate Conservation**

27 Xerces, named after an extinct butterfly, has the mission of protecting insects and other
28 invertebrates because of their importance to healthy ecosystems, and has a program dedicated to

1 preventing invertebrate extinction. Jepsen Decl. ¶ 14. Xerces' 44,000 supporters and 12,000
2 donating members provide money and volunteer time with the goal of protecting invertebrates
3 through science and advocacy on the state, federal, and international levels. *Id.* ¶ 8. California
4 residents alone have invested nearly \$500,000 in Xerces in the last three years in furtherance of this
5 mission, and at least 395 have contributed bumble bee observation data to Xerces' community
6 science program. *Id.* ¶¶ 8, 11.

7 **2. Defenders of Wildlife**

8 Defenders and its over 1.8 million members, including 279,000 Californians, are dedicated to
9 protecting native species and their habitats. Delfino Decl. ¶¶ 3–7. Defenders' 2019-2028 Strategic
10 Plan places defending pollinators like the California Native Bees among its top priorities. *Id.* ¶ 10.
11 Defenders protects pollinators through its advocacy efforts, from ensuring that the federal Farm Bill
12 supports pollinator conservation to pushing for the establishment of California's Monarch Butterfly
13 and Pollinator Rescue Program. *Id.* ¶ 9. Defenders also engages in public education about
14 endangered species, pollinators generally, and the California Native Bees particularly. *Id.* ¶ 17.
15 Additionally, Defenders has nearly twenty years of experience working on CESA advocacy. *Id.* ¶ 15.

16 **3. The Center for Food Safety**

17 CFS is a public interest and environmental advocacy nonprofit whose mission is to protect the
18 public, animals, and the environment from the adverse impacts of industrial agriculture. Spector
19 Decl. ¶ 3. CFS has over 970,000 farmer and consumer members, 100,000 of whom are Californians.
20 *Id.* ¶ 18. Because wild bees pollinate sustainable farms, the survival of bees, including the California
21 Native Bees, is crucial to CFS's mission. *Id.* ¶¶ 9–11. To protect bees, CFS educates the public on
22 pollinators' role in food production, encourages public participation, advocates for bee-friendly
23 policies, and litigates when necessary. *Id.* ¶¶ 10–14. For example, CFS runs a community science
24 program that allows members to identify plants that are pollinated by specific bees and encourages
25 them to cultivate these plants in their own farms and gardens. *Id.* CFS also regularly submits
26 comments and letters to federal and state agencies about pesticide regulations. *Id.*

1 **B. Listing Petition Interest**

2 Applicants created the Listing Petition that led to the Commission’s challenged decision, did
3 decades of work that led to the Listing Petition, and were actively involved in the Commission’s
4 entire decision-making process. A Xerces member was the first to document the decline in two of the
5 California Native Bees over 20 years ago. Jepsen Decl. ¶ 17. In the last twelve years, both CFS and
6 Xerces launched community science programs that collect data on bumble bee sightings, including
7 sightings of the California Native Bees. *Id.* ¶ 10–11; Spector Decl. ¶ 14. Xerces members and
8 professional conservation biologists studied the California Native Bees for decades; Xerces staff also
9 spent hundreds of hours comparing observation data to historical records and drafting the Listing
10 Petition, which all Applicants worked for months to perfect. Jepsen Decl. ¶ 19.

11 Between filing the Listing Petition and the Commission’s decision to accept it, Xerces staff
12 briefed members of the Commission on the status of the California Native Bees, submitted
13 supplemental information to the Department regarding the Bees’ range and relative abundance, and
14 presented at the June 12, 2019, public hearing where the Commission accepted the petition. Jepsen
15 Decl. ¶ 20. All Applicants were also involved in a public media campaign in support of the listing;
16 CFS alone had over 1,300 members contact the Commission during its consideration. *Id.*; Spector
17 Decl. ¶ 16. Moreover, when the Commission was first accused of lacking the authority to list the
18 Bees, Applicants submitted a memorandum to the Commission defending that authority. Exhibit B
19 1–4.

20 **C. Recreation, Economic, and Food Interests**

21 Applicants’ members recreate in areas whose habitats depend on wild pollinators and engage
22 in activities like farming, gardening, bee watching, identifying plants and other pollinator-dependent
23 species, outdoor photography, hiking, and other recreational activities linked to the California Native
24 Bees. Jepsen Decl. ¶¶ 7, 12; Delfino Decl. ¶¶ 15, 16; Spector Decl. ¶¶ 19–21. Many enjoy recreating
25 in areas pollinated specifically by the California Native Bees, and often make it a point of looking for
26 the California Native Bees because they enjoy seeing these increasingly rare species. Jepsen Decl.
27 ¶ 7; Delfino Decl. ¶ 15. Like all Californians, Applicants’ members eat food that is possibly
28 pollinated by the California Native Bees, and many member farmers and gardeners grow food

1 pollinated by the Bees. Jepsen Decl. ¶ 15; Delfino Decl. ¶ 16; Spector Decl. ¶¶ 20–21. These
2 members have already noticed reductions in bumble bees on their properties and have experienced
3 lower plant yields. Spector Decl. ¶¶ 20–21. Many of Applicants’ members use personal time,
4 resources, and land to conserve pollinators, e.g., by forgoing the use of harmful pesticides and
5 planting bee-friendly plants in their farms and yards to supplant dwindling natural habitats. Many of
6 these steps are purposefully aimed at conserving the California Native Bees specifically. *Id.*; Jepsen
7 Decl. ¶ 12. Delfino Decl. ¶ 16.

8 **D. CESA Interest**

9 The Commission’s decision to list the California Native Bees as candidate species confirms
10 that endangered insects, which are among those that form the bedrock of all habitats, can and must
11 receive state legal protections. Delfino Decl. ¶ 11. Applicants have long believed that CESA
12 protections extend to invertebrates, including insects through the Fish and Game Code’s explicit
13 statutory language and intent. *Id.* ¶ 13; *see* Fish & Game Code §§ 45, 2051, 2062. Confirming that
14 insects can be protected under CESA is thus key to Applicants’ missions. Additionally, CESA seeks
15 to protect endangered species’ values to Californians, including Applicants’ members. *See* Fish &
16 Game Code § 2051.

17 **E. Reputational Interest**

18 Applicants’ reputations are intertwined with the success of the Listing Petition. Applicants
19 members’ donate to and support Applicants in order to further their own interests in conservation,
20 invertebrate protections, and food safety, and many have directly taken part in the campaign to
21 protect the California Native Bees through community science programs. Jepsen Decl. ¶¶ 10–15, 25–
22 27; Delfino Decl. ¶¶ 18, 24 Spector Decl. ¶¶ 14–17, 22. It is possible that a negative outcome in this
23 case could harm Applicants’ reputations or reduce their membership or donations. Jepsen Decl. ¶ 25;
24 Delfino Decl. ¶ 24.

25 **ARGUMENT**

26 California Code of Civil Procedure section 387 provides for two types of intervention: as-of-
27 right and permissive. Applicants meet the standards for both.

1 **I. Applicants Are Entitled to Intervene as of Right.**

2 Section 387 provides that a court shall permit an applicant to intervene: (1) “upon timely
3 application,” when (2) the applicant “claims an interest relating to . . . the subject of the action” and
4 (3) “the disposition of the action may impair or impede [the applicant]’s ability to protect that
5 interest,” unless (4) the applicant’s “interest is adequately represented” by an existing party. Code
6 Civ. Proc. § 387(d)(1)(B). Intervention is intended “to promote fairness by involving all parties
7 potentially affected by a judgment.” *Simpson Redwood Co. v. California*, 196 Cal. App. 3d 1192,
8 1199 (1987). “[S]ection 387 should be liberally construed in favor of intervention.” *Id.* at 1200.
9 Applicants meet every requirement of section 387(d)(1)(B).¹

10 **A. Applicants’ Motion Is Timely.**

11 To be timely, the “right to intervene should be asserted within a reasonable time” such that it
12 will not delay the suit. *Sanders v. Pacific Gas & Electric Co.*, 53 Cal. App.3d 661, 668–69 (1975).
13 Almond Alliance filed its writ petition on September 9, 2019, and filed an amended petition on
14 October 4; Applicants seek to intervene only three months after Almond Alliance’s initial petition,
15 while the administrative record is still under preparation, and before any briefing schedule has been
16 established. Applicants’ motion is thus timely. *See Citizens for Balanced Use v. Montana*
17 *Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (finding that motion to intervene filed within
18 three months of complaint would not disrupt or delay proceedings, and was thus timely).

19 **B. Applicants Have an Interest in Invertebrate Conservation Generally and the**
20 **Commission’s Decision to Accept the California Native Bees as Candidate Species**
under CESA Specifically.

21 Under section 387, an applicant seeking intervention must “claim[] an interest relating to the
22 property or transaction that is the subject of the action.” Code Civ. Proc. § 387(d)(1)(B). Nonprofits
23 can demonstrate an interest in an action by showing: (1) support for a measure at issue in a case; (2)
24 that the measure at issue protects their members’ interests; or (3) that the measure at issue implicates
25 their missions or reputations. In this case, Applicants demonstrate interests in all three ways.

26 _____
27 ¹ Section 387 was updated in 2018 to allow a moving party to file either a complaint or answer in
28 intervention and to make “other clarifying and non-substantive changes to modernize the statute.” S.
Judiciary Comm., Cal. Bill Analysis, A.B. 1693, at 1 (June 20, 2017).

1 First, nonprofits have an interest in cases litigating measures they supported. *Simpson*
2 *Redwood*, 196 Cal. App. 3d at 1198–99 (holding that the Save-The-Redwoods League had an interest
3 in an action adjudicating title to land that the League had helped turn into a state park); *US Ecology,*
4 *Inc. v. State*, 92 Cal. App. 4th 113, 139 (2001) (concluding that a nonprofit had an interest in action
5 adjudicating an administrative decision the nonprofit had previously litigated); *Idaho Farm Bureau*
6 *Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (holding that a nonprofit is “entitled as a matter
7 of right to intervene in an action challenging the legality of a measure it has supported”).²

8 Applicants prepared the Listing Petition and otherwise invested in the decision that is
9 challenged here, just like the intervenors in *Simpson Redwood*, *US Ecology*, and *Idaho Farm Bureau*.
10 Jepsen Decl. ¶¶ 17–21; Delfino Decl. ¶ 9; Spector Decl. ¶¶ 6–9. *Idaho Farm Bureau* concerned a
11 challenge to the federal Fish and Wildlife Service’s decision to list a snail as endangered; there,
12 several conservation groups were granted as-of-right intervention because they had petitioned for the
13 listing. 58 F.3d at 1397.³ Here, Applicants not only wrote the Petition, but they and their members
14 were also intimately involved in every step of the Commission’s decision-making process, thereby
15 giving them an interest in defending their investment in protecting the California Native Bees.
16 Jepsen Decl. ¶ 17–21; Spector Decl. ¶ 16.

17 Second, nonprofits have an interest in cases adjudicating statutes that protect their members’
18 interests. *Rominger*, 147 Cal. App. 3d at 662-63. The *Rominger* court found that the intervening
19

20 ² Although *Simpson Redwood* and *US Ecology* concerned permissive intervention, section 387
21 requires both permissive and as-of-right intervenors to have “an interest” in the subject matter of a
22 case. Code Civ. Proc. § 387(d)(1)(B), (d)(2). In fact, some courts have demanded a higher interest
23 standard for permissive intervention. Compare *Lindelli v. Town of San Anselmo* 139 Cal. App. 4th
24 1499, 1505 (2006) (demanding a “direct and immediate interest” of permissive intervenors in the
subject matter of the lawsuit) with *Hodge v. Kirkpatrick Development, Inc.*, 130 Cal. App. 4th 540,
548–49 (2005) (requiring only that potential as-of-right intervenor claim “an interest relating to” the
lawsuit; at other times describing that interest as “direct”).

25 ³ California’s as-of-right intervention under section 387 is substantively “the exact counterpart to rule
26 24(a) of the Federal Rules of Civil Procedure.” *Hodge*, 130 Cal. App. 4th at 556. Thus, “the
27 Legislature must have intended that they should have the same meaning, force and effect as have
28 been given the federal rules by the federal courts.” *Id.* Federal cases are therefore appropriate guides
to intervention in state proceedings. See also *Ziani Homeowners Ass’n v. Brookfield Ziani, LLC*, 243
Cal. App. 4th 274, 280-82 (2015) (concluding that intervention under section 387 should “be
interpreted consistently with federal cases”).

1 nonprofit had interests in defending an anti-pesticide ordinance it had supported and in protecting the
2 health of its members, which the law was meant to protect. *Id.* Similarly here, CESA is intended to
3 protect both endangered species and the many “ecological, educational, recreational, esthetic,
4 economic, and scientific” values people derive from those species. Fish & Game Code § 2051.
5 Applicants’ Californian members are scientists who study bees, including the California Native Bees;
6 farmers and gardeners who rely on wild bees to pollinate their plants; and others who enjoy searching
7 for and being among the California Native Bees. Jepsen Decl. ¶¶ 7, 12; Delfino Decl. ¶¶ 15–17;
8 Spector Decl. ¶¶ 19–21. In other words, CESA intentionally protects Applicants’ members’ interests
9 in endangered species like the California Native Bees, which permits Applicants to intervene in this
10 case. *See Rominger*, 147 Cal. App. 3d at 662-63.

11 Finally, nonprofits have interests in defending their missions and reputations. In *Simpson*
12 *Redwood*, the court gave weight to the League’s mission to conserve redwoods and noted that an
13 adverse ruling could harm the League’s reputation. 196 Cal. App. 3d at 1200-01; *see also US*
14 *Ecology*, 92 Cal. App. 4th at 139 (concluding that nonprofit’s “broad[] focus on environmental and
15 safety concerns relating to” a challenged decision was an intervention-worthy interest). Here, each
16 Applicant’s mission calls for the conservation of insects, which is the central issue in this case.
17 Jepsen Decl. ¶ 14; Delfino Decl. ¶¶ 4-7, 10; Spector Decl. ¶ 3. Moreover, Applicants’ investment in
18 conserving the California Native Bees means their reputations are at stake, as in *Simpson Redwood*.

19 One California court decision casts doubt on the strength of reputational and mission-based
20 interests for intervention purposes, but it is inapposite here. *See City and County of San Francisco v.*
21 *State of California*, 128 Cal. App. 4th 1030, 1042–43 (2005). In *City and County*, the court held that
22 a nonprofit founded *after* the passage of a challenged initiative did not have sufficient interest in
23 protecting its reputation to intervene to defend the initiative. *Id.* The nonprofit did not support (and
24 indeed could not have supported) the initiative’s passage, and its members could not point to any
25 personal interests in the initiative. *Id.* *City and County* is therefore unlike this case, where
26 Applicants were the prime movers in the challenged decision and CESA exists to protect the interests
27 of Applicants’ members in the California Native Bees. Moreover, the importance of reputational
28 interests has been reaffirmed in cases such as *City of Malibu v. California Coastal Commission*,

1 where a party was denied intervention in part because it lacked a reputational interest. 128 Cal. App.
2 4th 897, 904–905 (2005). Here, Applicants have interests in the time and resources they spent
3 convincing the Commission to list the California Native Bees, their members directly benefit from
4 CESA applying to the Bees, and their missions and reputations are intertwined with gaining CESA
5 protections for the Bees and other insects.

6 **C. This Litigation May Impair Applicants’ Interests in Protecting Invertebrates and**
7 **Defending the Listing Decision.**

8 To intervene as a matter of right, parties must show that the “disposition of the action may
9 impair or impede” their ability to protect their interests. Code Civ. Proc. § 387(d)(1)(B). The
10 outcome of this case could impair Applicants’ interests in their missions to protect insects,
11 Applicants’ reputations (which are intertwined with their work on the Listing Petition), and
12 Applicants’ members’ interests in protecting the California Native Bees.

13 A case that affects a nonprofit’s mission, work, or reputational interests can impair those
14 interests. In *Simpson Redwood*, if the plaintiff logging company had been successful in quieting title
15 to a redwood forest, then the Save-The-Redwoods League’s mission of preserving redwoods may
16 have been impaired, its work in preserving the park at issue invalidated, and its reputation tarnished,
17 all of which supported intervention. 196 Cal. App. 3d at 1201; *see also Idaho Farm Bureau*, 58 F.3d
18 at 1398 (finding that action that could overturn decision to list snail as endangered would impair the
19 mission and investment of organization that petitioned for the listing).

20 Limiting the Commission’s authority to list insects may impair Applicants’ missions to
21 preserve insects and all the wildlife that depends on them, and to provide the ecological conditions
22 necessary for sustainable food production. Jepsen Decl. ¶ 26; Delfino Decl. ¶ 11; Spector Decl. ¶ 18.
23 An inability to protect insects through CESA would make it more difficult for Applicants to protect
24 other pollinators in California, which are key to each Applicants’ missions and important to all
25 Californians. Listing Petition at 6. The impairment here is therefore greater than in *Simpson*
26 *Redwood*, where the League’s interests were limited to a specific park. 196 Cal. App. 3d at 1201.

27 Overturning the Commission’s decision to list the California Native Bees could invalidate
28 Applicants’ and their members’ investment in that listing. *Idaho Farm Bureau*, 58 F.3d at 1398.

1 Such invalidation could also harm Applicants’ reputations. Almond Alliance suggests that
2 Applicants’ Listing Petition lacks sufficient science. First Am. Writ Pet. ¶¶ 27, 34, 47. Invalidation
3 of the Listing Petition therefore may undermine Applicants’ methods, or make Applicants’ members
4 feel that their own efforts were wasted, either of which could harm Applicants’ reputations. Just as
5 the League may have lost support in *Simpson Redwood*, Applicants may lose support or donations if
6 the Commission’s listing decision is overturned.

7 Finally, overturning the Commission’s listing decision may also impair Applicants’ members’
8 interest in protecting the California Native Bees themselves. In *Rominger*, the Sierra Club was
9 allowed to intervene to defend an ordinance in part because it alleged that a repeal may have harmed
10 its members’ health and well-being. 147 Cal. App. 3d at 662–63. As detailed above, Applicants’
11 members have recreational, aesthetic, economic, and other interests in the California Native Bees,
12 which CESA is designed to protect. Fish & Game Code § 2051; Jepsen Decl. ¶¶ 7, 12; Delfino Decl.
13 ¶¶ 15–17; Spector Decl. ¶¶ 19–21. If the Commission’s decision is overturned, it may be more likely
14 for the Bees to continue dying off, thereby impairing Applicants’ members’ interests in the
15 recreational, scientific, and economic values that the Bees provide. Jepsen Decl. ¶ 24. *See also*
16 *Simpson Redwood*, 196 Cal. App. 3d at 1200 (recognizing that an adverse ruling may have impaired
17 the League’s members’ interest in recreating in the park at issue).

18 **D. The Existing Parties Do Not Adequately Represent Applicants’ Interests.**

19 Where an action may impede an intervenor’s interest, intervention must be granted unless
20 existing parties adequately represent that interest. Code Civ. Proc. § 387(d)(1)(B). This prong is
21 satisfied “if the applicant shows that representation of [its] interest ‘may be’ inadequate; and the
22 burden of making that showing should be treated as minimal.” *Lewis v. County of Sacramento*, 218
23 Cal. App. 3d 214, 219 (1990) (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528,
24 538 n.10 (1972)). In this case, the Commission and the Department do not adequately represent
25 Applicants’ interests.

26 Government agencies must protect “the broad public interest” as compared to “more narrow,
27 parochial interests” of intervenors. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d
28 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Society v. U.S. Forest Service*,

1 630 F.3d 1173 (9th Cir. 2011); *see also Simpson Redwood*, 196 Cal. App. 3d at 1204 (recognizing
2 that the State’s broad public interests could have been served by a monetary settlement, whereas
3 intervenor’s interest was specifically to preserve the property in question in its natural condition).
4 Even environmental-regulation agencies do not adequately represent environmental advocates. *See*
5 *California Dump Truck Owners Ass’n v. Nichols*, 275 F.R.D. 303, 308 (E.D. Cal. 2011) (finding that
6 the California Air Resources Board did not adequately represent a conservation group’s interests,
7 despite a shared objective, because the Board had to balance interests beyond conservation).

8 Here the Commission and the Department are charged with balancing the public’s various
9 interests, whereas Applicants have just one aim: maximizing protection for the California Native
10 Bees. Applicants petitioned for and continue to insist that the California Native Bees be listed as
11 endangered, but the Commission has only designated the Bees as candidate species, has not
12 undertaken final consideration of the Listing Petition, and has yet to form any specific policies for
13 protecting the Bees. *See* 14 C.C.R. § 670.1(e), (i). Although the Commission may one day list the
14 California Native Bees as endangered, it could also list them as only threatened, or even remove their
15 candidacy to avoid further litigation. *Id.* Applicants’ interest in protecting the specific academic,
16 economic, and recreational value of the California Native Bees is therefore as “singular and indeed
17 unique” as the League’s interest in protecting the redwood grove in *Simpson Redwood*. 196 Cal.
18 App. 3d at 1204.

19 Moreover, a government agency cannot adequately represent an organization with specialized
20 expertise. *Sagebrush Rebellion Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983); *see also Utah Ass’n*
21 *of Ctys. v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (“[T]he showing [of inadequate
22 representation] is met when the applicant for intervention has expertise the government may not
23 have.”). In *Sagebrush Rebellion*, the Ninth Circuit concluded that the Secretary of the Interior did not
24 adequately represent the interests of the intervening conservation organizations in part because the
25 organizations had relevant avian expertise that the government did not. 713 F.2d 528. Likewise
26 here, each Applicant has a unique wealth of scientific knowledge pertaining to insect conservation.
27 Jepsen Decl. ¶¶ 4–13; Delfino Decl. ¶ 21, 17; Spector Decl. ¶¶ 10–11. Xerces in particular focuses
28 exclusively on invertebrate conservation, has a large staff of entomologists, and has significant

1 experience studying the California Native Bees. Jepsen Decl. ¶¶ 4–13. The Commission and the
2 Department, who have not yet regulated insect conservation, lack this extensive knowledge.
3 Applicants’ interests in insect conservation and in the California Native Bees cannot be adequately
4 represented in this case because no party has similar expertise in the underlying science.

5 In short, Applicants are entitled to as-of-right intervention because this motion is timely,
6 Applicants have interests in insect conservation and CESA protections, this case may impair those
7 interests, and existing parties do not adequately represent such interests.

8 **II. Alternatively, Applicants Meet the Requirements for Permissive Intervention.**

9 Applicants alternatively qualify for permissive intervention. Courts grant permissive
10 intervention (1) upon timely motion, when “[2] the party has a direct and immediate interest in the
11 action; [3] the intervention will not enlarge the issues in the litigation; and [4] the reasons for the
12 intervention outweigh any opposition by the parties presently in the action.” *U.S. Ecology*, 92 Cal.
13 App. 4th at 139; *see* Code Civ. Proc. § 387(d)(2). Applicants meet each requirement.

14 First, as noted above, Applicants have timely submitted this motion and will not delay or
15 disrupt the proceedings. *Sanders*, 53 Cal. App. 3d at 668; *Citizens for Balanced Use*, 647 F.3d at
16 897. It is only three months since Almond Alliance’s first filing, the administrative record is still
17 under preparation, and no briefing schedule is established.

18 Second, Applicants have established their interests in protecting their missions to conserve
19 insects, defending their members’ interests in the California Native Bees, validating their investment
20 in the Listing Petition, and protecting their reputations. Courts routinely grant permissive
21 intervention when similar interests are at play. *See, e.g., Rominger*, 147 Cal. App. 3d at 662
22 (concluding that nonprofits have an interest in cases adjudicating statutes that protect their members’
23 interests); *Simpson Redwood*, 196 Cal. App. 3d at 1201 (concluding that nonprofit had an interest in
24 furthering its mission to conserve redwoods).

25 Third, Applicants will not “enlarge the issues so as to litigate matters not raised by the
26 original parties.” *Rominger*, 147 Cal. App. 3d at 661. Here, Applicants seek only to defend the
27 Commission’s decision to list the California Native Bees and its authority to list insects under CESA,
28 the exact issues Almond Alliance has raised in its writ petition. Applicants will provide the Court

1 with specialized expertise, but will not raise new facts, which are contained solely in the
2 administrative record. Applicants' extensive knowledge, background, and experience with CESA
3 and the California Native Bees will only serve to inform the adjudication of Almond Alliance's legal
4 claim.

5 Fourth, as indicated in the Introduction, Petitioners and Respondents have indicated they do
6 not oppose this motion.

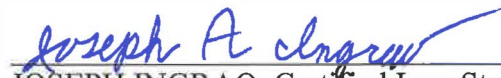
7 **CONCLUSION**

8 Applicants satisfy the requirements for intervention as of right under Code of Civil Procedure
9 section 387(d)(1)(B), and, alternatively, permissive intervention under Code of Civil Procedure
10 section 387(d)(2). Applicants therefore respectfully request that the Court grant them leave to
11 intervene as Respondents and Defendants in this action and accept the Answer in Intervention
12 submitted herewith.

13
14 DATED: January 28, 2020

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

15
16
17 By:



JOSEPH INGRAO, Certified Law Student
MATTHEW J. SANDERS, Supervising Attorney

18
19 Attorneys for Intervenors Xerces Society for
20 Invertebrate Conservation, Defenders of Wildlife, and
21 Center for Food Safety.

EXHIBIT A



ATTORNEYS AT LAW

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October 25, 2018

Melissa Miller-Henson
California Fish and Game Commission
P.O. Box 944209
Sacramento, CA 94244-2090
fgc@fgc.ca.gov

Re: Petition to List Crotch bumble bee, Franklin's bumble bee, Suckley cuckoo bumble bee, and Western bumble bee

Dear Acting Executive Director Miller-Henson:

I am writing on behalf of Wonderful Orchards with respect to the above-referenced petition filed with the Fish and Game Commission by The Xerces Society and others.

Under Fish and Game Code section 2073 and California Code of Regulations, title 14, section 670.1(b), the Commission has 10 days to determine if the petition is complete and refer it to the Department. The petition is incomplete on its face, and, therefore, the Commission should return it to the petitioners pursuant to California Code of Regulations, title 14, section 670.1(b).

The petition is deficient because the California Endangered Species Act (CESA) extends to "native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant." Cal. Fish & Game Code § 2062 (definition of endangered species); *see also* Cal. Fish & Game Code §§ 2067, 2068. It does not extend to insects. *See* Cal. Atty. Gen. Op. 98-105 ("Insects are ineligible for listing as a threatened or endangered species under the California Endangered Species Act").

Because petitioners seek to list a class of life that is not among those eligible for listing, the petition is deficient on its face and must be rejected.

Sincerely,

A handwritten signature in blue ink that reads 'P. S. Weiland'.

Paul S. Weiland
Nossaman LLP

cc: Chuck Bonham, Director of the Department of Fish and Wildlife
Mike Yaun, Counsel to the Fish and Game Commission

EXHIBIT B

May 31, 2019

Via Electronic Mail

Acting Executive Director Melissa Miller-Henson
California Fish and Game Commission
P.O. Box 944209
Sacramento, California 94244-2090
fgc@fgc.ca.gov

**Petition to List Crotch bumble bee, Franklin's bumble bee,
Suckle cuckoo bumble bee, and Western bumble bee**

Dear Director Miller-Henson and Commissioners:

We write on behalf Defenders of Wildlife, The Xerces Society, and Center for Food Safety in support of their October 16, 2018 petition to the California Fish and Game Commission ("Commission") to list four species of bumble bee under the California Endangered Species Act ("CESA").

The Commission has the authority to list the four proposed insect species under CESA for the following independently sufficient reasons. First, the plain text of CESA includes invertebrates as a category of species that may be listed. Second, the Legislature has repeatedly expressed its intention that CESA protections be applied broadly. Third, amendments to CESA plainly and unequivocally identify insects as an eligible category of species for listing. Finally, even if there were textual ambiguity, the Commission has broad authority to exercise its judgment in making listing determinations, which are entitled to significant deference under California law.

A. *The text of CESA plainly includes invertebrates as an eligible species*

The California Fish and Game Code, as amended in 1969 prior to CESA's enactment in 1970, defines "fish" to include "a wild fish, mollusk, crustacean, *invertebrate*, amphibian, or part, span, or ovum of any of those animals." Cal. Fish and Game Code § 45. While it may seem odd to include insects within the definition of "fish," the statute is clear that invertebrates are to be considered fish, and insects unquestionably fall within the biological definition of invertebrates.

When the California Legislature enacted the Endangered Species Act, it presumptively understood that "fish" was defined by the Code to include "invertebrate." This fact explains why, in the provision that became Section 2062, the Legislature defined "endangered species" to mean "a native species or subspecies of bird, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct," and elected not to expressly include "invertebrates" in that list. In fact, a bill analysis for an amendment to

CESA prepared by the Department of Fish and Game (as it was then known), dated June 26, 1984, states that while Section 2062 did not expressly identify invertebrates as eligible for listing, “it was the Department’s understanding of legislative intent that the Act was to extend to invertebrates as well.” Memorandum from Eugene V. Toffoli to DFG Director Pete Bontadelli at 4 (Jan. 31, 1990). The analysis noted that “[i]t was not believed necessary to include the term invertebrate in the original legislation because ‘fish’ is defined in the Fish and Game Code to include ‘invertebrates.’” *Id.* On the basis of this understanding of the inclusion of invertebrates within the definition of “fish” in section 45, the Department has listed several species of invertebrates over the last few decades. *See* 14 C.C.R. § 670.5.

B. The Legislature has repeatedly articulated a clear intent to apply protections broadly

In 1970, during the same legislative session that it enacted both the Species Preservation Act and CESA, the Legislature adopted Assembly Joint Resolution No. 31, in which it expressed that “[t]he preservation, protection, and enhancement of *all fish and wildlife* in the State of California is essential to the maintenance of a high-quality environment” 1970 Stats. at 3793, Resolutions Ch. 196 (emphasis added).

Four years later, the Legislature enacted the Native Species Conservation and Enhancement Act, which stated in part that “it is the policy of this state” to “maintain sufficient populations of *all species of wildlife* and the habitat necessary to insure their continued existence at the highest levels possible” Cal. Fish & Game Code § 1755, Stats. 1974, ch. 898. As a 1990 opinion letter from the Office of the Attorney General notes, “the phrase ‘all species of wildlife’ as it is used in section 1755, would certainly include invertebrates and insects.” Memorandum from Bruce Klafter to Cal. Fish and Game Commission at 3 (Jan. 23, 1990). The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute. *In re Greg F.*, 55 Cal. 4th 393, 407 (2012). Here, when the Legislature amended CESA in 1984, it should be presumed to have been aware of section 1755’s broad mandate.

C. Subsequent amendments to CESA unequivocally identify insects as eligible

If there were any doubt about the Legislature’s intent as to the eligibility of insects for protection under CESA, the Legislature provided an answer when it amended the statute in the late 1980s, and again last year. In 1988, the Legislature added provisions to CESA creating civil penalties for actions harmful to protected species. Section 2582, as amended, states in relevant part that the Department of Fish and Wildlife “may impose civil liability” on any individuals who “[u]nlawfully export, import, transport, sell, possess, receive, acquire, or purchase . . . any plants, *insects, or other species listed* pursuant to the California Endangered Species Act” Cal. Fish & Game Code § 2582, Stats. 1988, ch. 1059, sec. 4 (emphasis added).

Section 2582 reflects the Legislature’s understanding that insects are eligible for protection under CESA. It is axiomatic that a general term in a list (i.e., “other species listed pursuant to [CESA]”) is qualified by the specific terms that surround it (i.e., “insects”). In fact, the Legislature codified this fundamental principle of statutory construction in the Civil Code. *See* Cal. Civ. Code § 3534 (“Particular expressions qualify those which are general.”). The California Supreme Court has repeatedly and consistently applied the principle in its statutory interpretation. *See, e.g., People v. Giordiano*, 42 Cal. 4th 644, 660 (2007) (noting that “the general term or category is restricted to those things that are similar to those which are enumerated specifically”); *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1159-60 (1991) (same). In other words, the Legislature could only have intended that “insects” mean one such “species listed pursuant to the California Endangered Species Act.”

Finally, just last year, the Legislature passed numerous substantive amendments to CESA. If it had so desired, the Legislature could have removed “insects” from the liability provision in Section 2582 or from the definition of “fish” in Section 45. Its decision to leave these provisions intact reinforces the clear fact that “insects” are eligible for protection under the Act.

D. The Commission is entitled to significant deference in its listing determinations

Even if a court were to find that CESA is ambiguous as to whether insects are eligible for protection, it would defer to the Commission’s judgment. California courts have consistently granted significant deference to the Commission’s listing determinations. *See, e.g., Central Coast Forest Association v. Fish and Game Comm’n*, 18 Cal. App. 5th 1191, 1198-99 (2018) (“The statutory structure of CESA indicates that the courts should accord a great deal of deference to the Commission where its determination is supported by department scientists.”); *id.* at 1207 (“The department’s substantial role in the [listing] process is consistent with the deference we must accord its determination when reviewing the Commission’s decision.”); *California Forestry Assn. v. California Fish & Game Comm’n*, 156 Cal. App. 4th 1535, 1546 (2007) (noting that “deference to the Commission and the Department’s interpretation of the term ‘species or subspecies’ as including evolutionarily significant units is appropriate here given their central role in the listing process, . . .”). As such, a court is very likely to uphold the Commission’s determination to list the four species at issue here, even if it finds some statutory ambiguity as to the eligibility of insects.

As a final note, the Commission should disregard a 1998 opinion from the Office of the Attorney General concluding in cursory fashion that insects are ineligible for listing under CESA. That opinion is based exclusively on the text of Section 2062. It fails to address the definition of “fish” under Section 45 of CESA, and it ignores entirely the civil liability amendment that clearly and unequivocally identifies “insects” as a category of species eligible for protection under the Act. *See* 98 Ops.Cal.Atty.Gen. 105 at 3-5 (June 23, 1998).

For the foregoing reasons, the Commission has the legal authority to list the four species of bumble bee for which Defenders of Wildlife, The Xerces Society, and Center for Food Safety filed their petition. We strongly urge the Commission to exercise that authority and list these imminently threatened species as expeditiously as possible.

Sincerely,

Ben DeGolia
Mills Legal Clinic
Stanford Law School