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6 Attorneys for Intervenor FRESNO COUNTY SUPERIOR COURT

7  
8  
9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11 SACRAMENTO DIVISION

12 JOHN B. CRUZ, et al.,  
13 Plaintiffs,  
14 vs.  
15 COUNTY OF FRESNO, et al.,  
16 Defendants.

Case No. 1:93-cv-05070 GGH

**FRESNO COUNTY SUPERIOR COURT'S  
NOTICE OF MOTION AND MOTION TO  
INTERVENE PURSUANT TO FEDERAL  
RULE OF CIVIL PROCEDURE 24**

**Fed. R. Civ. P. 24(a)(1); Fed. R. Civ. P.  
24(b)(1)(B); 18 U.S.C. §3626(a)(3)(F)**

17  
18 **TO EACH PARTY AND HIS/HER/ITS COUNSEL OF RECORD:**

19 YOU ARE HEREBY NOTIFIED that on **Thursday, September 8, 2011**, at  
20 **10:00 a.m.** in Courtroom 9 of the above-entitled court, located at 501 "I" Street, 13th Floor,  
21 Sacramento, California, Intervenor FRESNO COUNTY SUPERIOR COURT will move this  
22 Court for an order allowing it to intervene in this matter.

23 The Motion will be made pursuant to Federal Rule of Civil Procedure, Rules  
24 24(a)(1) and 24(b)(1)(B).

25 The Fresno County Superior Court hereby moves to intervene and seek  
26 clarification in this matter relating to "prisoner release orders" as set forth in the "Stipulation re  
27 Permanent Injunction; Order" entered in the above-captioned case on February 25, 1994.  
28 (Attached hereto as Exhibit A.) The order in question constitutes a release order within the



1 meaning of the Prison Litigation Reform Act (PLRA). 18 U.S.C. § 3626(g). The Superior Court  
2 seeks to intervene pursuant to Federal Rule of Civil Procedure, Rule 24(a) and 24(b), which  
3 provide for intervention as of right where a “statute of the United States grants an unconditional  
4 right to intervene” and for permissive intervention where “common question[s] of law or fact”  
5 exist. Fed. R. Civ. P. 24(a)(1), (b)(1)(B).

6 The PLRA grants a statutory right of intervention to any unit of government  
7 whose function concerns the custody or release of persons who may be released as a result of a  
8 federal prisoner release order. 18 U.S.C. § 3626(a)(3)(F). At the present time, the release order  
9 in question states that the Fresno County Sheriff “shall limit and control” the population level  
10 within the Fresno County Jails within certain, specified bed capacity population caps. However,  
11 because the Sheriff has closed two floors of Fresno’s main jail facilities due to budget restraints,  
12 the bed capacity set forth in the release order is no longer consistent with the either the design  
13 capacity of the Fresno County Jails or the staffing capacity of the Fresno County Jails. (See  
14 Proposed Memorandum in Support of Motion for Clarification filed herewith.) The Superior  
15 Court’s ability to enforce prisoner detention orders consistent with California law is directly  
16 affected by the meaning of “capacity” within the release order.

17 Accordingly, for the reasons set forth in the accompanying memorandum of law  
18 in support of this motion, the Superior Court respectfully requests that this Court grant  
19 intervention and resolve the issue raised in the Proposed Motion for Clarification, that is:  
20 whether “capacity” within the meaning of the order means the number of prisoners the jail  
21 facilities can physically provide beds for, or the number of prisoners the Sheriff has allocated  
22 funds to provide beds for. A copy of the proposed pleading is attached hereto as Exhibit B.

23 Dated: July 14, 2011

DOWLING, AARON & KEELER, INC.

24  
25 By: /s/ Donald R. Fischbach

DONALD R. FISCHBACH  
STEPHANIE HAMILTON BORCHERS  
Attorneys for Intervenor  
FRESNO COUNTY SUPERIOR COURT

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27  
28 14733-001\00771792.DOC.

## **Exhibit A**

1 PHILLIP S. CRONIN, COUNTY COUNSEL  
2 J. Wesley Merritt, Chief Deputy #071939  
3 County of Fresno  
4 2220 Tulare Street, Fifth Floor  
5 Fresno, CA 93721  
6 Telephone: (209) 488-3479

7 JOHN HAGAR #81039  
LAW OFFICE OF JOHN HAGAR  
P.O. Box 86935  
Los Angeles, CA 90086-0935  
Telephone: (213) 626-2089

FILED

FEB 25 1994

CLERK, U. S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

Attorneys for Defendants  
COUNTY OF FRESNO, SHERIFF STEVE MAGARIAN

LOGGED

10 FEB 23 1994

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JACK L. WAGNER, CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
1 BY DEPUTY CLERK

13 JOHN B. CRUZ, et al., ) No. F-93-5070 JFM [P]  
14 )  
15 Plaintiffs, )  
16 v. )  
17 COUNTY OF FRESNO, et al., ) STIPULATION RE PERMANENT  
18 Defendants. ) INJUNCTION; ORDER

19 The parties hereby agree and stipulate to the following  
20 Permanent Injunction:

21 1. The parties stipulate that this litigation is a class  
22 action as defined by Rule 23 of the Federal Rules of Civil  
23 Procedure.

24 2. Defendants shall limit and control the population level  
25 within the Fresno County Jails as follows:  
26 / / /

28 COUNTY OF FRESNO  
Fresno, California

1 38

1 A. Defendants are enjoined from bedding inmates on the  
2 floor.

3 NORTH ANNEX JAIL

4 B. Defendants shall operate the North Annex Jail at the  
5 bed capacities set forth below:

6	Second Floor	Number of Beds
7	Pod A	72
	Pod B	72
8	Pod C	72
	Pod D	72
9	Pod E	72
	Pod F	72
10		
	TOTAL	432

11 C. Defendants shall operate the North Annex Jail utilizing  
12 the five additional correctional officers added to the North  
13 Annex Jail's staff as part of the settlement concerning  
14 plaintiffs' Application for Temporary Restraining Order.

15 D. Inmates in the North Annex Jail shall be provided  
16 access to one hour of daily exercise in the North Jail exercise  
17 area. Recreation time outside the housing unit will not be made  
18 up for those inmates who are away from the housing unit at other  
19 activities during the housing unit's regularly scheduled  
20 recreation. Inmates housed in discipline isolation will not be  
21 provided with recreation time during their length of stay in  
22 discipline isolation housing up to a maximum of ten [10]  
23 consecutive days.

24 / / /  
25 / / /  
26

1                   **MAIN JAIL**

2                   E. Defendants shall operate the Main Jail under the Pilot  
3 Project approved by the California Board of Corrections with  
4 sixteen "general population" housing pods which are triple  
5 bunked [768 beds] and operated as dormitories; eight "special  
6 handling" pods which are double bunked [256 beds] with special  
7 handling inmates having controlled dayroom access; and forty  
8 "administrative segregation" cells which will be operated for  
9 single occupancy housing [40 beds].

10                  F. Defendants shall implement the transition to the  
11 housing configurations set forth in paragraph E above under the  
12 time phased "Pilot Project Staffing and Capital Project  
13 Transition Plan" previously filed with the Court as Exhibit A in  
14 the Stipulation approved by the Court on October 29, 1993.  
15 Specifically, this Transition Plan establishes the timing of the  
16 addition of staff [seven Correctional Sergeants, seventeen  
17 Correctional Officers, and one Office Assistant]; the addition  
18 of one shower in each general population housing pod; the  
19 addition of isometric exercise equipment, etc.

20                  G. Defendants shall implement their plan to reduce the  
21 noise levels in the Main Jail by providing acoustical treatment  
22 for the ceilings of the Main Jail as set forth in the Transition  
23 Plan.

24                  H. Plaintiffs' counsel Paul Comiskey shall be provided  
25 reasonable access to the Main Jail during the Pilot Project  
26

1 period to monitor the transition as described above. Defendants  
2 shall provide Paul Comiskey with copies of those reports  
3 required by the Board of Corrections during the pilot period.  
4 Should for any reason the Board of Corrections disapprove the  
5 Pilot Project, or recommend modifications of the operation of  
6 the Main Jail during the pilot period, defendants shall notify  
7 plaintiffs' counsel in writing within ten [10] days of receiving  
8 such notification from the Board of Corrections. In the event  
9 of disapproval or modification of the Pilot Project during the  
10 pilot period, either party may seek to change the terms of this  
11 injunction pursuant to the standards set forth in Rufo v.  
12 Inmates of Suffolk County Jail, \_\_\_ U.S. \_\_\_, 112 S.Ct. 748  
13 (1992).

14 I. Inmates housed in the Main Jail shall be offered the  
15 opportunity to receive recreation as follows:

16 1. Inmates housed in general population units shall  
17 be provided with the opportunity for twenty [20] hours of  
18 recreation outside their housing unit each month. These  
19 recreation opportunities shall include at least 1.5 hours of  
20 roof recreation each week. In addition, general population  
21 inmates will receive the opportunity to participate in at least  
22 eight indoor recreation sessions outside their housing unit each  
23 month.<sup>1</sup>

24  
25 <sup>1</sup>. General population inmates are currently housed in pods  
26 C, D, E, and F on each Main Jail floor.

1           2. Inmates housed in Administrative Segregation and  
2 Special Housing units shall receive twelve [12] hours of  
3 recreation each month outside their housing unit each month in  
4 addition to dayroom access as appropriate for administrative  
5 segregation and special housing inmates.<sup>2</sup>

6           3. Recreation time outside the housing unit will not  
7 be made up for those inmates who are away from the housing unit  
8 at other activities during the housing unit's regularly  
9 scheduled recreation. Inmates housed in discipline isolation  
10 will not be provided with recreation time during their length of  
11 stay in discipline isolation housing up to a maximum of ten [10]  
12 consecutive days.

13           4. The provisions for Main Jail recreation outside  
14 the housing unit shall begin after the completion of the  
15 renovations required by the Board of Corrections Pilot Project  
16 as set forth in the aforementioned Transition Plan;<sup>3</sup>

17           5. Defendants shall make available to the Sheriff's  
18 Department jail recreation specialists the "Recommendations and  
19 Suggestions" of Dr. Edward Bernauer dated December 31, 1993.  
20 Defendants shall retain, evaluate, and consider implementing  
21 those suggestions that they deem reasonable and useful,  
22 reserving the right to implement none of those suggestions.

23  
24           <sup>2</sup>. Administrative segregation and special housing inmates  
are currently housed in units A, B, and FF on each floor.

25           <sup>3</sup>. Defendants anticipate those renovations to be completed  
26 by July 1, 1994.



1 SOUTH ANNEX JAIL

2 J. Defendants shall operate the South Annex Jail at the  
3 following capacities:

4	SAJ 1 A [DORM]	45 beds
5	SAJ 1 B [DORM]	15 beds
6	SAJ 1 C [DORM]	45 beds
7	SAJ 1 D [DORM]	20 beds
8	SAJ 1 E [DORM]	6 beds <sup>4</sup>
9	SAJ 1 F	20 beds
10	SAJ 1 G	36 beds
11	SAJ 2 D	6 beds
12	SAJ 2 F	24 beds
13	SAJ 2 G	48 beds
14	SAJ 3 A	24 beds
15	SAJ 3 B	24 beds
16	SAJ 3 C	43 beds
17	SAJ 3 D	43 beds
18	SAJ 3 F	24 beds
19	SAJ 3 G	48 beds
20	SAJ 4 A	50 beds
21	SAJ 4 B	8 beds
22	SAJ 4 C	50 beds
23	SAJ 4 D	32 beds

24  
25 <sup>4</sup>. The agreed upon population for each South Annex Jail  
26 dormitory is 140% of said dormitory's Board of Corrections "rated  
capacity."

1 SAJ 4 F 32 beds

2 SAJ 4 G 32 beds

3 K. The above referenced dormitories shall be offered the  
4 opportunity to receive 30 hours of recreation per month in  
5 either the South Annex Jail's indoor or outdoor recreation  
6 areas. All other housing units in the South Annex Jail shall be  
7 offered the opportunity to receive 20 hours of recreation per  
8 month in either the South Annex Jail's indoor or outdoor  
9 recreation areas. Recreation time outside the housing unit will  
10 not be made up for those inmates who are away from the housing  
11 unit at other activities during the housing unit's regularly  
12 scheduled recreation. Inmates housed in discipline isolation  
13 will not be provided with recreation time during their length of  
14 stay in discipline isolation housing up to a maximum of ten [10]  
15 consecutive days.

16 L. The provision for South Annex Jail exercise outside  
17 the housing unit shall begin when the Fresno Superior Court  
18 reopens and vacates the recreation and exercise orders set forth  
19 in Lynn Polard et al. v. Harold McKinney, Case No. 227358-9,  
20 dated July 7, 1978; Paul Daniels et al. v. Harold McKinney, Case  
21 No. 259869-6, dated January 30, 1981; In re Richard Morgan, Case  
22 Nos. 281302-0, 281438-2, 284164-1, dated January 17, 1983; In re  
23 Richard Morgan, Case Nos. 308318-5, 316580-0, dated March 27,  
24 1985; In re Steven Ransbury, et al., Case Nos 286040-1, 285427-  
25 1, 289487-1, dated April 29, 1985. Counsel for plaintiffs shall

26

COUNTY OF FRESNO  
Fresno, California

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1 cooperate with counsel for defendants in filing and appearing in  
2 court, if necessary concerning the County's motion to reopen and  
3 vacate those orders.

4 3. The Sheriff of Fresno County is authorized by this  
5 order to release inmates from the Fresno County Jail System or  
6 refuse to accept inmates for booking into the Fresno County Jail  
7 System whenever the Fresno County Jail System, or any facility  
8 therein, or any specific housing unit therein, reaches ninety  
9 percent [90%] of capacity. The Sheriff shall release inmates or  
10 refuse to accept newly-committed inmates when the total  
11 population of the Fresno County Jail System, or any facility  
12 therein, or any housing unit therein, reaches one hundred  
13 percent (100%) of capacity.

14 4. Either party may seek to change the terms of this  
15 injunction pursuant to the standards set forth in Rufo v.  
16 Inmates of Suffolk County Jail, \_\_\_ U.S. \_\_\_, 112 S.Ct. 748  
17 (1992).

18 5. In the event that an emergency threatens the Sheriff's  
19 ability to comply with these orders, counsel for defendants will  
20 notify counsel for plaintiffs no later than the next business  
21 day.

22 6. Defendants shall pay to plaintiffs' counsel Paul  
23 Comiskey attorney fees in the amount of \$33,000.00 at the time  
24 of the filing of the Final Judgement.

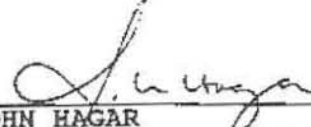
25 7. The parties stipulate that the Honorable Gregory  
26

1       Hollows be the judge for all purposes concerning the fairness  
2       hearing and Final Judgement in this case.

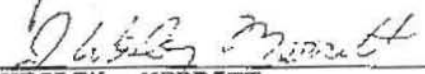
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IT IS SO STIPULATED:

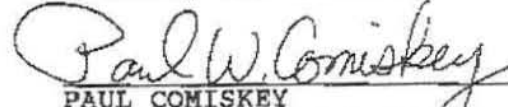
DATED: January 28, 1994

  
\_\_\_\_\_  
JOHN HAGAR  
Attorney for Defendants

DATED: February 5, 1994

  
\_\_\_\_\_  
J. WESLEY MERRITT  
Attorney for Defendants

DATED: February 4, 1994


  
\_\_\_\_\_  
PAUL COMISKEY  
Attorney for Plaintiffs

\* \* \* \*

ORDER

IT IS SO ORDERED.

DATED: February 23, 1994

  
\_\_\_\_\_  
HONORABLE GREGORY HOLLOWES  
United States Magistrate Judge  
Eastern District of California

## **Exhibit B**

1 Donald R. Fischbach #053522  
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6 Attorneys for Intervenor FRESNO COUNTY SUPERIOR COURT

7  
8  
9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11 SACRAMENTO DIVISION

12 JOHN B. CRUZ, et al.,  
13 Plaintiffs,  
14 vs.  
15 COUNTY OF FRESNO, et al.,  
16 Defendants.

Case No. 1:93-cv-05070 GGH

**NOTICE OF MOTION FOR  
CLARIFICATION OF CONSENT  
DECREE; MOTION**

17  
18 **TO EACH PARTY AND HIS/HER/ITS COUNSEL OF RECORD:**

19 YOU ARE HEREBY NOTIFIED that on \_\_\_\_\_, 2011, at 10:00 a.m.  
20 in Courtroom 9 of the above-entitled court, located at 501 "I" Street, 13th Floor, Sacramento,  
21 California, Intervenor FRESNO COUNTY SUPERIOR COURT will move this Court for an  
22 order clarifying the Permanent Injunction; Order previously entered in this matter.

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The Motion will be based on this Notice, the accompanying Memorandum in Support of Motion for Clarification of Permanent Injunction, the Court's records and file in the above-captioned and any further evidence and/or argument the Court will receive at or before the hearing on the Motion.

Dated: \_\_\_\_\_, 2011 DOWLING, AARON & KEELER, INC.

By: \_\_\_\_\_  
DONALD R. FISCHBACH  
STEPHANIE HAMILTON BORCHERS  
Attorneys for Intervenor  
FRESNO COUNTY SUPERIOR COURT

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6 Attorneys for Intervenor FRESNO COUNTY SUPERIOR COURT

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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11 SACRAMENTO DIVISION

12 JOHN B. CRUZ, et al.,  
13 Plaintiffs,  
14 vs.  
15 COUNTY OF FRESNO, et al.,  
16 Defendants.

Case No. 1:93-cv-05070 GGH

**[PROPOSED] MEMORANDUM IN  
SUPPORT OF MOTION FOR  
CLARIFICATION OF PERMANENT  
INJUNCTION; ORDER**

17  
18 The Fresno Superior Court ("Superior Court") submits the following  
19 memorandum of points and authorities in support of its motion for an order clarifying the  
20 "Permanent Injunction; Order" previously entered in this matter.

21 **I.**

22 **INTRODUCTION**

23 The above captioned litigation arose out of the plaintiffs' allegations, among other  
24 things, of unconstitutional overcrowding in the Fresno County jails. Through a stipulated  
25 resolution, this Court ultimately entered a Stipulation re Permanent Injunction; Order in February  
26 of 1994, commonly referred to by the parties as the Consent Decree.

27 Under the Consent Decree (a copy of which is attached hereto as Exhibit 1), the  
28 Fresno County jail facilities were described as having a combined total designed bed capacity of





1 2,171 beds. The Fresno County Sheriff (“Sheriff”) is, under the Decree, authorized to release  
2 inmates and/or refuse new inmates whenever the population of the jail as a whole, or any facility  
3 therein, or any specific housing unit therein, reaches 90% of “capacity,” and the Sheriff is  
4 required to release inmates or refuse to accept newly-committed inmates when the jail, or any  
5 facility therein, reaches 100% of “capacity.” Without the Decree, all early prisoner releases  
6 would have to comply with the rules and procedures governing such releases under California  
7 law.

8 In the time since the Consent Decree was entered, the County of Fresno  
9 constructed additional jail facilities, increasing the total *designed* bed capacity in Fresno County  
10 to 3,778 beds. The Sheriff has since, however, closed two floors of the jail due to budget  
11 constraints, resulting in a total current *staffed* capacity of approximately 1900 beds, well below  
12 the design capacity of the Fresno County jail facilities. Thus, the jails are currently operating a  
13 “staffed capacity” of approximately 1900 beds but continue to maintain a “design capacity” of  
14 more than 3,700 beds, and the Consent Decree does not specify whether releases are mandated  
15 under the Decree at 90-100% of design capacity, or at 90-100% of staffed capacity. In other  
16 words, it is unclear whether “capacity” within the meaning of the Decree means the number of  
17 prisoners the jail facilities can physically provide beds for, or the number of prisoners the Sheriff  
18 has allocated funds to provide beds for.

19 Because California law governs the early release of prisoners absent federal  
20 preemption of those laws, it is important for the Superior Court to have clarification of when the  
21 Consent Decree governs early prisoner releases in Fresno County and when, on the other hand,  
22 those releases must occur in compliance with State law.

## 23 II.

### 24 ARGUMENT

#### 25 A. The Superior Court Must Receive an Interpretation of the Decree in Order 26 to Perform Their Respective Duties

27 A district court can and should, upon request, interpret a permanent order of a  
28 court. *Nehmer v. U.S. Dep’t of Veterans Affairs*, 494 F.3d 846, 860 (9th Cir. 2007) (the District

1 Court “is the principal and proper arbiter [of the Consent Decree] with the responsibility to  
2 interpret the Decree and oversee the litigation.”)

3 California has specific laws that outline the manner in which early prisoner  
4 releases can legally occur. (See, e.g., Penal Code § 4024.1.) Penal Code section 4024.1  
5 provides, amongst other things, that the Sheriff must apply to the presiding judge of the superior  
6 court to receive authorization for early releases for periods of 30 days at a time, and outlines the  
7 manner in which those releases must be carried out.

8 Because the Consent Decree operates to preempt California law as it applies to  
9 the early release of prisoners when the jails reach 90-100% of “capacity,” the meaning of the  
10 word “capacity” within the Consent Decree is critical to whether, and the extent of, the Superior  
11 Court’s obligation and duty to ensure enforcement of its orders and compliance with early  
12 release procedures such as those set forth in Penal Code section 4024.1 as outlined above.

13 The Superior Court’s obligation to fulfill its judicial function and enforce its  
14 orders is not a trivial one. As stated by the Supreme Court in *Young v. United States ex rel.*  
15 *Vuitton Et Fils S. A.*, 481 U.S. 787, 796 (U.S. 1987), “[t]he ability to punish disobedience to  
16 judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its  
17 own authority . . . .” Without such powers, the courts are “impotent, and what the Constitution  
18 now fittingly calls ‘the judicial power of the United States’ would be a mere mockery.”  
19 *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

20 Without a clarification from this Court regarding the meaning of the term  
21 “capacity” in the Consent Decree, the Superior Court has little ability to meaningfully perform  
22 its role in the criminal justice system. Releases conducted pursuant to the Decree are essentially  
23 exempt from California law under the Supremacy Clause, whereas if a release is *not* mandated  
24 by the Decree’s terms, and occurs in violation of the Superior Court’s orders and without  
25 compliance with California law, the Superior Court has an obligation to take steps to remedy  
26 noncompliance.

27 Similarly, the Sheriff has an obligation both to follow California law and to  
28 remain in compliance with this Court’s Order. (See generally Cal. Gov. Code § 26605 [Sheriff is

1 the “sole and exclusive keeper of the jail”]; Cal. Penal Code § 4015(a) [Sheriff must “receive all  
2 prisoners committed to the jail by competent authority]; Penal Code § 4024.1 [describing  
3 methods by which a sheriff can release prisoners to alleviate overcrowding].) Because it is  
4 unclear under the Decree when the Decree excuses the Sheriff and the Superior Court from  
5 compliance with State law, it is necessary to receive clarification of whether capacity within the  
6 Decree means “design capacity” or “staffed capacity.”

7 **B. The Consent Decree Language**

8 The 1994 Order states, in relevant part, that the Sheriff is “enjoined from bedding  
9 inmates on the floor” and that, to effectuate that mandate, the Sheriff is “authorized by this order  
10 to release inmates from the Fresno County Jail System or refuse to accept inmates for booking  
11 into the Fresno County Jail System whenever the Fresno County Jail System, or any facility  
12 therein, or any specific unit therein, reaches ninety percent [90%] of capacity. The Sheriff shall  
13 release inmates or refuse to accept newly-committed inmates when the total population of the  
14 Fresno County Jail System, or any facility therein, or any housing unit therein, reaches one  
15 hundred percent (100%) of capacity.” (Consent Decree at page 8, lines 4-13.)

16 The Decree does not define capacity and does not contemplate the effect of  
17 “empty beds” due to lack of staffing. Nor does the Decree contemplate increases or decreases to  
18 the Fresno jail facilities’ bed count. The intent of the Decree, however, is clear and stated  
19 expressly within the document itself: to control the jail population and to ensure that inmates do  
20 not sleep on the floor. (Consent Decree at page 3, lines 1-2.)

21 On the other hand, a Consent Decree cannot, of course, be interpreted as a license  
22 to ignore state law under all circumstances. Rather, there is generally a strong presumption  
23 against supremacy preemption, especially with regard to matters that generally fall within the  
24 purview of the State, such as the incarceration of criminals. (See, e.g., *Brown v. Plata*, 563 U.S.  
25 \_\_\_, 131 S.Ct. 1910, 1929 [describing narrowness required of federal prisoner release orders];  
26 *Stone v. City and County of San Francisco*, 968 F.2d 850 (9th Cir. 1992) [noting that override of  
27 state laws in prison release orders should be a last resort].) As set forth above, the Superior

28 ///

1 Court has an obligation to ensure compliance with its orders and State law governing early  
2 release to the extent any of those releases are not mandated by the Consent Decree.

3 The Superior Court and the Sheriff need guidance to determine the boundaries of  
4 the Decree. If the Decree authorizes prisoner releases whenever the jail is at “staffed capacity,”  
5 the Superior Court’s obligation to ensure enforcement of its orders and to enforce State law  
6 regarding the procedures that must be followed for early prisoner releases is replaced by the  
7 supremacy of the federal order. If, however, the Decree only authorizes releases when the jail is  
8 at “design capacity,” then up to that point California law and procedure must be followed in  
9 order to legally effectuate an early prisoner release.

10 **III.**

11 **CONCLUSION**

12 Given the unprecedented state of California and Fresno County’s financial crisis  
13 and jail overcrowding, the Superior Court is now faced with a near endless cycle of  
14 noncompliance with its orders. Similarly, the Sheriff is faced with a near endless cycle of  
15 prisoners that must be released due to lack of bed space. Because the Superior Court and the  
16 Sheriff both desire to comply with California law and with this Court’s release order, the  
17 Superior Court requests this Court clarify whether the Decree preempts State law and authorizes  
18 early release when the Fresno jails are at 90-100% *design* capacity, or when they are at 90-100%  
19 *staffed* capacity due to budget constraints.

20  
21 Dated: \_\_\_\_\_, 2011

DOWLING, AARON & KEELER, INC.

22  
23 By: \_\_\_\_\_  
24 DONALD R. FISCHBACH  
25 STEPHANIE HAMILTON BORCHERS  
26 Attorneys for Intervenor  
27 FRESNO COUNTY SUPERIOR COURT

28 14733-001\00771789.DOC.



## **Exhibit 1**

1 PHILLIP S. CRONIN, COUNTY COUNSEL  
2 J. Wesley Merritt, Chief Deputy #071939  
3 County of Fresno  
4 2220 Tulare Street, Fifth Floor  
5 Fresno, CA 93721  
6 Telephone: (209) 488-3479

7 JOHN HAGAR #81039  
LAW OFFICE OF JOHN HAGAR  
P.O. Box 86935  
Los Angeles, CA 90086-0935  
Telephone: (213) 626-2089

FILED

FEB 25 1994

CLERK, U. S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

Attorneys for Defendants  
COUNTY OF FRESNO, SHERIFF STEVE MAGARIAN

**LODGED**

10 FEB 23 1994

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JACK L. WAGNER, CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY DEPUTY CLERK

13 JOHN B. CRUZ, et al., } No. F-93-5070 JFM [P]  
14 }  
15 Plaintiffs, }  
16 v. }  
17 COUNTY OF FRESNO, et al., }  
18 Defendants. }  
19 }

20 The parties hereby agree and stipulate to the following  
21 Permanent Injunction:

22 1. The parties stipulate that this litigation is a class  
23 action as defined by Rule 23 of the Federal Rules of Civil  
24 Procedure.

25 2. Defendants shall limit and control the population level  
26 within the Fresno County Jails as follows:  
27 / / /

28 COUNTY OF FRESNO  
Fresno, California

1 38

1 A. Defendants are enjoined from bedding inmates on the  
2 floor.

3 NORTH ANNEX JAIL

4 B. Defendants shall operate the North Annex Jail at the  
5 bed capacities set forth below:

6	Second Floor	Number of Beds
7	Pod A	72
	Pod B	72
8	Pod C	72
	Pod D	72
9	Pod E	72
	Pod F	72
10	TOTAL	432

11 C. Defendants shall operate the North Annex Jail utilizing  
12 the five additional correctional officers added to the North  
13 Annex Jail's staff as part of the settlement concerning  
14 plaintiffs' Application for Temporary Restraining Order.

15 D. Inmates in the North Annex Jail shall be provided  
16 access to one hour of daily exercise in the North Jail exercise  
17 area. Recreation time outside the housing unit will not be made  
18 up for those inmates who are away from the housing unit at other  
19 activities during the housing unit's regularly scheduled  
20 recreation. Inmates housed in discipline isolation will not be  
21 provided with recreation time during their length of stay in  
22 discipline isolation housing up to a maximum of ten [10]  
23 consecutive days.

24 / / /  
25 / / /  
26

1                   **MAIN JAIL**

2                   E. Defendants shall operate the Main Jail under the Pilot  
3 Project approved by the California Board of Corrections with  
4 sixteen "general population" housing pods which are triple  
5 bunked [768 beds] and operated as dormitories; eight "special  
6 handling" pods which are double bunked [256 beds] with special  
7 handling inmates having controlled dayroom access; and forty  
8 "administrative segregation" cells which will be operated for  
9 single occupancy housing [40 beds].

10                  F. Defendants shall implement the transition to the  
11 housing configurations set forth in paragraph E above under the  
12 time phased "Pilot Project Staffing and Capital Project  
13 Transition Plan" previously filed with the Court as Exhibit A in  
14 the Stipulation approved by the Court on October 29, 1993.  
15 Specifically, this Transition Plan establishes the timing of the  
16 addition of staff [seven Correctional Sergeants, seventeen  
17 Correctional Officers, and one Office Assistant]; the addition  
18 of one shower in each general population housing pod; the  
19 addition of isometric exercise equipment, etc.

20                  G. Defendants shall implement their plan to reduce the  
21 noise levels in the Main Jail by providing acoustical treatment  
22 for the ceilings of the Main Jail as set forth in the Transition  
23 Plan.

24                  H. Plaintiffs' counsel Paul Comiskey shall be provided  
25 reasonable access to the Main Jail during the Pilot Project



1 period to monitor the transition as described above. Defendants  
2 shall provide Paul Comiskey with copies of those reports  
3 required by the Board of Corrections during the pilot period.  
4 Should for any reason the Board of Corrections disapprove the  
5 Pilot Project, or recommend modifications of the operation of  
6 the Main Jail during the pilot period, defendants shall notify  
7 plaintiffs' counsel in writing within ten [10] days of receiving  
8 such notification from the Board of Corrections. In the event  
9 of disapproval or modification of the Pilot Project during the  
10 pilot period, either party may seek to change the terms of this  
11 injunction pursuant to the standards set forth in Rufo v.  
12 Inmates of Suffolk County Jail, \_\_\_ U.S. \_\_\_, 112 S.Ct. 748  
13 (1992).

14 I. Inmates housed in the Main Jail shall be offered the  
15 opportunity to receive recreation as follows:

16 1. Inmates housed in general population units shall  
17 be provided with the opportunity for twenty [20] hours of  
18 recreation outside their housing unit each month. These  
19 recreation opportunities shall include at least 1.5 hours of  
20 roof recreation each week. In addition, general population  
21 inmates will receive the opportunity to participate in at least  
22 eight indoor recreation sessions outside their housing unit each  
23 month.<sup>1</sup>

24  
25 <sup>1</sup>. General population inmates are currently housed in pods  
26 C, D, E, and F on each Main Jail floor.

1           2. Inmates housed in Administrative Segregation and  
2 Special Housing units shall receive twelve [12] hours of  
3 recreation each month outside their housing unit each month in  
4 addition to dayroom access as appropriate for administrative  
5 segregation and special housing inmates.<sup>2</sup>

6           3. Recreation time outside the housing unit will not  
7 be made up for those inmates who are away from the housing unit  
8 at other activities during the housing unit's regularly  
9 scheduled recreation. Inmates housed in discipline isolation  
10 will not be provided with recreation time during their length of  
11 stay in discipline isolation housing up to a maximum of ten [10]  
12 consecutive days.

13           4. The provisions for Main Jail recreation outside  
14 the housing unit shall begin after the completion of the  
15 renovations required by the Board of Corrections Pilot Project  
16 as set forth in the aforementioned Transition Plan;<sup>3</sup>

17           5. Defendants shall make available to the Sheriff's  
18 Department jail recreation specialists the "Recommendations and  
19 Suggestions" of Dr. Edward Bernauer dated December 31, 1993.  
20 Defendants shall retain, evaluate, and consider implementing  
21 those suggestions that they deem reasonable and useful,  
22 reserving the right to implement none of those suggestions.

23  
24           <sup>2</sup>. Administrative segregation and special housing inmates  
are currently housed in units A, B, and FF on each floor.

25           <sup>3</sup>. Defendants anticipate those renovations to be completed  
26 by July 1, 1994.

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**SOUTH ANNEX JAIL**

J. Defendants shall operate the South Annex Jail at the following capacities:

SAJ 1 A [DORM]	45 beds
SAJ 1 B [DORM]	15 beds
SAJ 1 C [DORM]	45 beds
SAJ 1 D [DORM]	20 beds
SAJ 1 E [DORM]	6 beds <sup>4</sup>
SAJ 1 F	20 beds
SAJ 1 G	36 beds
SAJ 2 D	6 beds
SAJ 2 F	24 beds
SAJ 2 G	48 beds
SAJ 3 A	24 beds
SAJ 3 B	24 beds
SAJ 3 C	43 beds
SAJ 3 D	43 beds
SAJ 3 F	24 beds
SAJ 3 G	48 beds
SAJ 4 A	50 beds
SAJ 4 B	8 beds
SAJ 4 C	50 beds
SAJ 4 D	32 beds

---

<sup>4</sup>. The agreed upon population for each South Annex Jail dormitory is 140% of said dormitory's Board of Corrections "rated capacity."

1 SAJ 4 F 32 beds

2 SAJ 4 G 32 beds

3 K. The above referenced dormitories shall be offered the  
4 opportunity to receive 30 hours of recreation per month in  
5 either the South Annex Jail's indoor or outdoor recreation  
6 areas. All other housing units in the South Annex Jail shall be  
7 offered the opportunity to receive 20 hours of recreation per  
8 month in either the South Annex Jail's indoor or outdoor  
9 recreation areas. Recreation time outside the housing unit will  
10 not be made up for those inmates who are away from the housing  
11 unit at other activities during the housing unit's regularly  
12 scheduled recreation. Inmates housed in discipline isolation  
13 will not be provided with recreation time during their length of  
14 stay in discipline isolation housing up to a maximum of ten [10]  
15 consecutive days.

16 L. The provision for South Annex Jail exercise outside  
17 the housing unit shall begin when the Fresno Superior Court  
18 reopens and vacates the recreation and exercise orders set forth  
19 in Lynn Polard et al. v. Harold McKinney, Case No. 227358-9,  
20 dated July 7, 1978; Paul Daniels et al. v. Harold McKinney, Case  
21 No. 259869-6, dated January 30, 1981; In re Richard Morgan, Case  
22 Nos. 281302-0, 281438-2, 284164-1, dated January 17, 1983; In re  
23 Richard Morgan, Case Nos. 308318-5, 316580-0, dated March 27,  
24 1985; In re Steven Ransbury, et al., Case Nos 286040-1, 285427-  
25 1, 289487-1, dated April 29, 1985. Counsel for plaintiffs shall

26

COUNTY OF FRESNO  
Fresno, California

28

1 cooperate with counsel for defendants in filing and appearing in  
2 court, if necessary concerning the County's motion to reopen and  
3 vacate those orders.

4 3. The Sheriff of Fresno County is authorized by this  
5 order to release inmates from the Fresno County Jail System or  
6 refuse to accept inmates for booking into the Fresno County Jail  
7 System whenever the Fresno County Jail System, or any facility  
8 therein, or any specific housing unit therein, reaches ninety  
9 percent [90%] of capacity. The Sheriff shall release inmates or  
10 refuse to accept newly-committed inmates when the total  
11 population of the Fresno County Jail System, or any facility  
12 therein, or any housing unit therein, reaches one hundred  
13 percent (100%) of capacity.

14 4. Either party may seek to change the terms of this  
15 injunction pursuant to the standards set forth in Rufo v.  
16 Inmates of Suffolk County Jail, \_\_\_ U.S. \_\_\_, 112 S.Ct. 748  
17 (1992).

18 5. In the event that an emergency threatens the Sheriff's  
19 ability to comply with these orders, counsel for defendants will  
20 notify counsel for plaintiffs no later than the next business  
21 day.

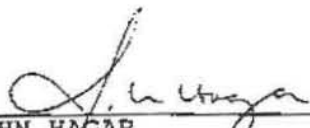
22 6. Defendants shall pay to plaintiffs' counsel Paul  
23 Comiskey attorney fees in the amount of \$33,000.00 at the time  
24 of the filing of the Final Judgement.

25 7. The parties stipulate that the Honorable Gregory  
26

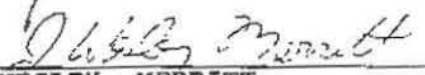
1 Hollows be the judge for all purposes concerning the fairness  
2 hearing and Final Judgement in this case.  
3

4 IT IS SO STIPULATED:

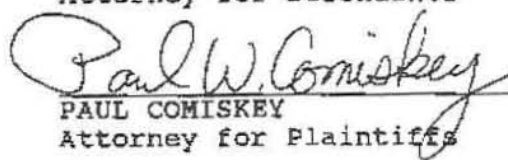
5  
6 DATED: January 28, 1994

  
\_\_\_\_\_  
JOHN HAGAR  
Attorney for Defendants

7  
8 DATED: February 5, 1994

  
\_\_\_\_\_  
J. WESLEY MERRITT  
Attorney for Defendants

9  
10  
11 DATED: February 4, 1994


  
\_\_\_\_\_  
PAUL COMISKEY  
Attorney for Plaintiffs

12  
13 \* \* \* \*

14 ORDER

15  
16 IT IS SO ORDERED.

17  
18 DATED: February 23, 1994

  
\_\_\_\_\_  
HONORABLE GREGORY HOLLOWES  
United States Magistrate Judge  
Eastern District of California

**PROOF OF SERVICE BY OVERNIGHT DELIVERY**

1  
2 **STATE OF CALIFORNIA** )  
3 **COUNTY OF FRESNO** ) **SS**

4 I am employed in the County of Fresno, State of California. I am over the age of 18 and  
5 not a party to the within action; my business address is Dowling, Aaron & Keeler, Inc., 8080 N.  
6 Palm Avenue, Third Floor, Fresno, California, 93711.

7 On July 14, 2011, I served the foregoing document(s) described as **FRESNO COUNTY**  
8 **SUPERIOR COURT'S NOTICE OF MOTION AND MOTION TO INTERVENE**  
9 **PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24** on the interested parties in  
10 this action addressed as follows:

11 Paul Wayne Comiskey / Current Counsel  
12 Prisoner Rights Union  
13 2308 J Street  
14 Sacramento, CA 95816-4718  
15 [paulcomiskey@earthlink.net](mailto:paulcomiskey@earthlink.net)

Michael D. Long  
901 H Street, Suite 208  
Sacramento, CA 95814  
[mike.long.law@msn.com](mailto:mike.long.law@msn.com)

16 Richard P. Herman  
17 Prisoner Rights Union  
18 5001 Birch Street  
19 Newport Beach, CA 92660  
20 [rherman@richardphermanlaw.com](mailto:rherman@richardphermanlaw.com)

*Courtesy copy to:*  
Martin J. Mayer  
Jones & Mayer  
3777 N. Harbor Blvd.  
Fullerton, CA 92835  
[mjm@jones-mayer.com](mailto:mjm@jones-mayer.com)

21 Kevin B. Briggs  
22 Fresno County Counsel  
23 2220 Tulare Street, Suite 500  
24 Fresno, CA 93721  
25 [kbriggs@co.fresno.ca.us](mailto:kbriggs@co.fresno.ca.us)

26 Said service was made by placing true copies thereof enclosed in a sealed envelope(s)  
27 addressed as stated above AND said service was made by overnight delivery. I am readily  
28 familiar with the firm's practice of collection and processing items for delivery with Golden  
State Overnight. Under that practice such envelope(s) is deposited at a box or other facility  
regularly maintained by Golden State Overnight or delivered to an authorized courier or driver  
authorized by Golden State Overnight to receive such envelope(s), in an envelope or package  
designated by Golden State Overnight with delivery fees paid or provided for, on the same day  
this declaration was executed, at Dowling, Aaron & Keeler, Inc., 8080 N. Palm Avenue, Third  
Floor, Fresno, California, 93711, in the ordinary course of business.

Executed on July 14, 2011, at Fresno, California.

I declare that I am employed in the office of a member of the Bar of this Court at whose  
direction the service was made. I declare under penalty of perjury under the laws of the United  
States of America that the above is true and correct.

/s/ Christine K. Banks  
Christine K. Banks, CCLS



1 Donald R. Fischbach #053522  
Stephanie Hamilton Borchers #192172  
2 DOWLING, AARON & KEELER, INC.  
8080 North Palm Avenue, Third Floor  
3 P.O. Box 28902  
Fresno, California 93729-8902  
4 Tel: (559) 432-4500  
Fax: (559) 432-4590  
5 Email: dfischbach@daklaw.com / sborchers@daklaw.com

6 Attorneys for Intervenor FRESNO COUNTY SUPERIOR COURT

7  
8

9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11 SACRAMENTO DIVISION

12 JOHN B. CRUZ, et al.,  
13 Plaintiffs,  
14 vs.  
15 COUNTY OF FRESNO, et al.,  
16 Defendants.

Case No. 1:93-cv-05070 GGH

**MEMORANDUM IN SUPPORT OF  
FRESNO COUNTY SUPERIOR COURT'S  
MOTION TO INTERVENE**

Date: September 8, 2011  
Time: 10:00 a.m.  
Courtroom: 9

17  
18

I.

19 **INTRODUCTION**

20 The Fresno Superior Court seeks to intervene in this civil action to obtain  
21 clarification of the February 25, 1994, "Stipulation re Permanent Injunction; Order," which is a  
22 federal prisoner release order (the "Consent Decree" or "Decree") arising out of the above-  
23 captioned litigation. The Consent Decree has the purpose and effect of authorizing the Fresno  
24 County Sheriff to release prisoners from custody under the authority of the federal court order  
25 when the Fresno County jails reach 90-100% of "capacity." California Penal Code section  
26 4024.1, on the other hand, sets forth the criteria and procedures governing early prisoner releases  
27 under California law. Because the Decree is ambiguous as to the meaning of the word  
28 "capacity," the Superior Court is left in the untenable position of being unable to determine when





1 the federal release order supersedes California law and preempts the Superior Court’s detention  
2 orders and its duty to require compliance with Penal Code section 4024.1. Accordingly, the  
3 Superior Court seeks to intervene and obtain clarification of the word “capacity” as used within  
4 the Decree.

5 **II.**

6 **BACKGROUND**

7 As this Court is aware, the Superior Court is responsible for, among other things,  
8 ordering the detention of criminal defendants, setting bail and sentencing criminal defendants  
9 according to the law. The Sheriff is responsible for carrying out these orders as they relate to the  
10 custody of criminal defendants. Due to the closing of multiple floors of the Fresno County Jail,  
11 prisoners are commonly released from custody in Fresno County without bail, without a promise  
12 to appear and before completion of their sentences. These releases are occurring under the  
13 authority of this court’s prior prisoner release order (the Decree), without compliance with Penal  
14 Code section 4024.1 or other laws and state court orders related to the sentencing and detention  
15 of prisoners.

16 The Superior Court is actively working with the Sheriff to ensure public safety,  
17 and also has a duty to uphold California law and enforce its orders. It is unclear from the Decree  
18 in this case when the Fresno County Jails are at “capacity” such that the release order would  
19 supplant California law as it relates to early prisoner releases. Accordingly, the Superior Court  
20 seeks clarification of the federal decree in order to best protect the public and protect the orderly  
21 administration of the judicial system.

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III.

ARGUMENT

A. The Superior Court Has Grounds to Intervene Both As of Right and In the Discretion of this Court

The Federal Rules of Civil Procedure provide for intervention “as of right” and permissive intervention.<sup>1</sup> Fed. R. Civ. P. 24. The Superior Court seeks to intervene as of right pursuant to Rule 24(a) and through the discretion of this Court under Rule 24(b). Rule 24(a) (intervention “of right”) provides, in relevant part, that “[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute . . . .”

Rule 24(b) (permissive intervention) provides, in relevant part, that intervention should be allowed when the intervenor “has a claim or defense that shares with the main action a common question of law or fact.”

The Superior Court’s right to intervene is therefore based on a federal statute, and is timely as it only seeks to clarify the order, not to directly alter the litigation. Similarly, the Superior Court should be allowed to permissively intervene, as it has a common factual and legal question as the parties regarding the need for clarification of the Consent Decree.

1. Intervention As Of Right

The Prison Litigation Reform Act (“PLRA”), 18 U.S.C. § 3626(a)(3)(F)<sup>2</sup> provides, in pertinent part:

“Any state or local official including a . . . unit of government whose jurisdiction or function includes . . . the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order . . . shall have the right to intervene in any proceeding relating to such relief.”

In this case, the Superior Court is entitled to intervene because its “jurisdiction or

<sup>1</sup> This Court retains jurisdiction over prospective relief orders. See *Gilmore v. U.S.*, 220 F.3d 987 (2000); see also *Nehmer v. U.S. Dep’t of Veterans’ Affairs*, 494 F.3d 846, 860 (9th Cir. 2007) [district courts have responsibility to interpret permanent orders and decrees].

<sup>2</sup> Further statutory references are to 18 U.S.C. § 3626 except as otherwise noted.



1 function” is to sentence and order the detention of prisoners, which necessarily affects the  
2 “custody of persons who may be released from, or not admitted to, a prison as a result of a  
3 prisoner release order.” A primary function of the Superior Court is to evaluate and order the  
4 detention of criminal defendants. See *People v. Navarro*, 7 Cal. 3d 248, 259 (Cal. 1972)  
5 [sentencing of criminal defendants is an exclusive and necessary judicial function]. As such, the  
6 Superior Court cannot perform a primary judicial function *without* the detention in custody of  
7 those criminal defendants for whom the Superior Court orders detention.

8 Federal courts have recognized the need to allow third party intervention as set  
9 forth in section 3626. In *Castillo v. Cameron County*, 238 F.3d 339, 349 (2001) the court  
10 affirmed the state of Texas’ right to intervene in a case regarding prisoner release orders, as the  
11 case would “adversely affect [the State’s] interests.” See also *Bowers v. City of Philadelphia*,  
12 2006 U.S. Dist. LEXIS 64651 (E.D. Pa. Sept. 8, 2006) [district attorney has standing to intervene  
13 in prisoner release litigation.] There is no question that how the Consent Decree in this case is  
14 interpreted has the capacity to “adversely affect” the Superior Court’s interests.

15 Accordingly, because a federal statute specifically provides for intervention to a  
16 unit of government whose jurisdiction or function includes the custody of prisoners, and the  
17 Superior Courts jurisdiction and function includes the custody of prisoners, intervention is proper  
18 as a matter of right because a federal statute so provides.

19 **2. Intervention Is Also Proper In The Court’s Discretion**

20 Intervention in this case is also proper under Rule 24(b), Permissive Intervention.  
21 Rule 24(b) provides, in pertinent part, that the court may grant intervention to “anyone to  
22 intervene who: . . . (B) has a claim or defense that shares with the main action a common  
23 question of law or fact.” Intervention under Rule 24(b) is entirely within this Court’s discretion  
24 once a showing of a common question of law or fact is shown and upon timely application.  
25 *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) (quotations  
26 and citation omitted); see *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir.  
27 2001) (noting that Rule 24(b) “plainly dispenses with any requirement that the intervenor shall

28 ///

1 have a direct personal or pecuniary interest in the subject of the litigation” and that all that is  
2 necessary for permissive intervention is a common question of law or fact with the main action).

3 In this case, the Superior Court has questions of law and fact in common with the  
4 main action that led to the Consent Decree, as it is critical to the entire administration of the  
5 criminal justice system that it be clear when the Decree will preempt California law regarding  
6 early releases. To the extent that the Superior Court’s orders are preempted by the Decree, its  
7 interest in the custody and detention of prisoners in the Fresno County jails is consistent with  
8 interests of the defendants in the main action, whose duty and obligation is also to ensure the  
9 custody and detention of prisoners as required by law.

10 Such similarity of claims and positions, as well as the fact that the Superior Court  
11 is directly affected by the Consent Decree, qualify as grounds for permissive intervention.  
12 *Stallworth v. Monsanto Co.* 558 F.2d 257, 265 (5th Cir. 1977); *Kootenai Tribe of Idaho v.*  
13 *Veneman* 313 F.3d 1094, 1008, (9th Cir. 2002).

14 Additionally, federal courts have routinely emphasized the general principle that  
15 the requirements of intervention should be broadly construed in favor of the intervenor. As  
16 stated in *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. Cal. 1998), “[i]n determining  
17 whether intervention is appropriate, we are guided primarily by practical and equitable  
18 considerations. We generally interpret the requirements broadly in favor of intervention.” See  
19 also *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir.  
20 1992) (“Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors and we  
21 are guided primarily by practical considerations.”)

22 Also in favor of permissive intervention in this case is the fact that no prejudice or  
23 undue delay will result from intervention solely for the purpose of clarification of the Decree.  
24 *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 (D.C. Cir. 2004) [reversing district court  
25 order denying post-judgment intervention and noting that no delay or prejudice could result from  
26 intervention after a consent decree is already in place]. In this case, the Superior Court is not  
27 seeking to alter the litigation or the remedy already stipulated to by the parties, it simply seeks

28 ///

1 clarification of that remedy, which will have no prejudicial effect or delay of enforcement on the  
2 Decree itself.

3 Finally, this court should allow intervention in its discretion in this case because it  
4 best serves judicial economy. Interpretation by this Court of the Decree will avoid intervenor  
5 Superior Court wasting judicial resources attempting to enforce compliance with its orders if  
6 those orders have, in fact, been preempted by the Decree.

7 **IV.**

8 **CONCLUSION**

9 The Superior Court seeks to intervene in this litigation solely for the purpose of  
10 obtaining clarification of a prior order of this court. Intervention by the Superior Court is  
11 appropriate under both as a matter of right under Rule 24(a) and permissively under Rule 24(b).  
12 Moreover, allowing the Superior Court to intervene will not cause prejudice to any party, undue  
13 delay in the proceedings and will greatly serve judicial economy.

14 Accordingly, for the reasons set forth herein, the Superior Court respectfully  
15 requests this Court grant its Motion to Intervene and allow it to seek clarification of the Consent  
16 Decree.

17 Dated: July 14, 2011

DOWLING, AARON & KEELER, INC.

19 By: /s/ Donald R. Fischbach

20 DONALD R. FISCHBACH  
21 STEPHANIE HAMILTON BORCHERS  
22 Attorneys for Intervenor  
23 FRESNO COUNTY SUPERIOR COURT  
24  
25  
26  
27

28 14733-001\00771793.DOC.

**PROOF OF SERVICE BY OVERNIGHT DELIVERY**

1  
2 STATE OF CALIFORNIA )  
3 COUNTY OF FRESNO ) SS

4 I am employed in the County of Fresno, State of California. I am over the age of 18 and  
5 not a party to the within action; my business address is Dowling, Aaron & Keeler, Inc., 8080 N.  
6 Palm Avenue, Third Floor, Fresno, California, 93711.

7 On July 14, 2011, I served the foregoing document(s) described as **MEMORANDUM  
8 IN SUPPORT OF FRESNO COUNTY SUPERIOR COURT’S MOTION TO  
9 INTERVENE** on the interested parties in this action addressed as follows:

10 Paul Wayne Comiskey / Current Counsel Michael D. Long  
11 Prisoner Rights Union 901 H Street, Suite 208  
12 2308 J Street Sacramento, CA 95814  
13 Sacramento, CA 95816-4718 [mike.long.law@msn.com](mailto:mike.long.law@msn.com)  
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17 Said service was made by placing true copies thereof enclosed in a sealed envelope(s)  
18 addressed as stated above AND said service was made by overnight delivery. I am readily  
19 familiar with the firm’s practice of collection and processing items for delivery with Golden  
20 State Overnight. Under that practice such envelope(s) is deposited at a box or other facility  
21 regularly maintained by Golden State Overnight or delivered to an authorized courier or driver  
22 authorized by Golden State Overnight to receive such envelope(s), in an envelope or package  
23 designated by Golden State Overnight with delivery fees paid or provided for, on the same day  
24 this declaration was executed, at Dowling, Aaron & Keeler, Inc., 8080 N. Palm Avenue, Third  
25 Floor, Fresno, California, 93711, in the ordinary course of business.

26 Executed on July 14, 2011, at Fresno, California.

27 I declare that I am employed in the office of a member of the Bar of this Court at whose  
28 direction the service was made. I declare under penalty of perjury under the laws of the United  
States of America that the above is true and correct.

/s/ Christine K. Banks, CCLS  
Christine K. Banks, CCLS

