No. 13-15390

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,
Plaintiff-Appellees,

v.

SALLY JEWELL, ET. AL.,
Defendants.

ENVIRONMENTAL ACTION COMMITTEE OF WEST MARIN, ET AL.,
Defendant-Intervenor Applicants-Appellants

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee Drakes Bay Oyster Company has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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GLOSSARY

AOB	Appellants' Opening Brief
DBOC	Drakes Bay Oyster Company
EAC	Proposed Intervenor Environmental Action Committee of West Marin
ER	Excerpts of Record filed by Proposed Intervenors
FGC	California Fish and Game Commission
FR Notice	Federal Register Notice, 77 Fed. Reg. 71,826 (Dec. 4, 2012)
NPCA	Proposed Intervenor National Parks Conservation Association
NPS	National Park Service
PRNS	Point Reyes National Seashore
RUO	Reservation of Use and Occupancy
SER	Supplemental Excerpts of Record filed by Plaintiff-Appellees
SUP	Special Use Permit
TRO	Plaintiff-Appellees' Ex Parte Application for a Temporary Restraining Order

I. INTRODUCTION

Environmental Action Committee of West Marin et al. (the "Proposed Intervenors") cannot meet the applicable standard for intervention, and do not try. When a proposed intervenor shares the "same interest" or "ultimate objective" as the government, the proposed intervenor must make a "very compelling showing" that its interest is not adequately represented by the government. Here the Proposed Intervenors share the same interest and ultimate objective as defendants Secretary of the Interior et al. (the "Federal Defendants"). They both want the oyster farm booted out as soon as possible. As a result, the "very compelling showing" standard applies.

The Proposed Intervenors never mention the phrase "very compelling showing." They cannot make a "very compelling showing" that their interests are not adequately represented by the Federal Defendants, because for the past forty years they have marched in lock step with the Federal Defendants. In the 1970s both took the position that the oyster farm should continue in operation despite the passage of the Wilderness Act. Recently they both changed positions together, and today both insist that the oyster farm must go.

Although the Proposed Intervenors assert that there are "significant differences" between them and the Federal Defendants, they fail to identify any non-trivial difference. The biggest difference, according to Proposed Intervenors, relates to the 90 days that the previous authorization gave Drakes Bay Oyster Company and Kevin Lunny (jointly "DBOC") to wind-down operations and vacate

the premises. But any difference about the 90 days cannot be significant, because no one has challenged the 90-day provision and it is not at issue in this litigation.

Moreover, the supposed difference is not a real difference. The Proposed Intervenors now say that DBOC's commercial operations during the wind-down period are prohibited by the 1964 Wilderness Act, 16 U.S.C. §§ 1131-1136. But the Proposed Intervenors said exactly the opposite in the district court when DBOC argued that its commercial activities prevented Drakes Estero from being converted from "potential wilderness" to "designated wilderness." In the briefing on that issue, the Proposed Intervenors stood shoulder to shoulder with the Federal Defendants: both asserted that DBOC's continuing operations are *not* "commercial" operations prohibited by the 1964 Wilderness Act.

The Federal Defendants and Proposed Intervenors have coordinated their briefing in opposition to DBOC. In briefs filed the same day, the Federal Defendants cited to declarations filed by the Proposed Intervenors, and the Proposed Intervenors cited to declarations filed by the Federal Defendants.

The Proposed Intervenors are now even more closely linked to the Federal Defendants, because defendant Secretary of the Interior Jewell was, until she became Secretary, a member of the Board of Trustees of one of the Proposed Intervenors.

Because the Proposed Intervenors cannot make a "very compelling showing" that the Federal Defendants will not adequately represent their interests, they are left with the weak argument that the standard does not apply to them. But it does. The requirement that proposed intervenors make a "very compelling

showing" was plainly designed for situations exactly like this, in which private organizations want to cheer on a federal agency that has been sued over an administrative decision those organizations support. Here, the Proposed Intervenors undoubtedly want to cheer the Federal Defendants on, but they are unable to make a showing, much less a "very compelling showing," that they have significantly different interests. At most, as the district court found, the Proposed Intervenors object to "the speed at which Defendants are moving, not to the substantive arguments that [the Federal Defendants] are likely to make in this litigation." Excerpts of Record ("ER") 11.

If the Proposed Intervenors do not need to make a "very compelling showing," what standard applies? According to the Proposed Intervenors, this Court should evaluate their compliance with three sub-factors, of which the first is the likelihood that a proposed intervenor will make arguments not made by the parties. But the Proposed Intervenors fail to meet that standard as well because they have not identified a single argument that they would make in the litigation that the Federal Defendants will not make.

If there is any difference between the Proposed Intervenors and the Federal Defendants, it is a mere difference in litigation tactics, and that is certainly not a "very compelling showing" that the Federal Defendants do not adequately represent the interests of the Proposed Intervenors.

The trial court's decision denying intervention should be affirmed.

II. JURISDICTIONAL STATEMENT

DBOC challenged the decision by the Federal Defendants to deny DBOC's application for a special use permit ("SUP"), which is a final agency action reviewable under 5 U.S.C. § 704. This case arises under, *inter alia*, the Administrative Procedures Act ("APA"), 5 U.S.C. § 551, *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*; and Pub. L. No. 111-88 § 124. The district court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331 and 5 U.S.C. § 702.

Proposed Intervenors appeal from the district court's February 4, 2013 order ("Order") denying their motion to intervene as of right pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. Pro.") 24(a). This Court has jurisdiction to review the Order under 28 U.S.C. § 1291. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

III. STATEMENT OF THE ISSUES

1. Whether Proposed Intervenors have made the necessary "very compelling showing" that the Federal Defendants are not adequately representing their interests in this litigation.

2. Whether Proposed Intervenors' interests will be practically impaired if they are not allowed to participate as parties in this action.

IV. STATEMENT OF THE CASE

Oysters and shellfish have been grown in Drakes Estero by permit with the State of California continuously since 1934. Supplemental Excerpts of Record ("SER") 373 ¶ 88; SER 452 (California Fish & Game Commission ("FGC") lease

issued to DBOC runs until 2029). In 1962, Congress enacted legislation authorizing the creation of the Point Reyes National Seashore, and in 1965, the State of California conveyed the water bottoms in Drakes Estero to the federal government, while retaining its mineral and fishing rights, including the right to lease Drakes Estero for aquaculture. 1965 Cal. Stat. chs. 983, 2604-05 (conveying Drakes Estero water bottoms to U.S. Government, but retaining fishing and mineral rights to California); SER 441, 443. DBOC produces approximately one-third of the oysters grown in California. SER 372 ¶ 85.

More than forty years ago, Federal Defendants purchased the land occupied by the Johnson Oyster Company on the shores of Drakes Estero, the oyster farmer at the time, and issued a lease-like authorization called a "Reservation for Use and Occupancy" (the "RUO") that allowed the oyster farm to operate on the shore of Drakes Estero. SER 377. That RUO, which expired on November 30, 2012, specified that it could be extended by the issuance of a Special Use Permit ("SUP"). *Id*. at SER 393, ¶ 11.

DBOC, the owner of the oyster farm since 2005, applied for a ten-year SUP to allow it to continue farming oysters at the farm's historic location. SER 363, ¶ 14. Secretary of the Interior Ken Salazar denied that application in a memorandum of decision ("Secretary's Memorandum") issued on November 29, 2012, stating that DBOC would not receive a SUP and would have to shut down within 90 days. ER 47. Also on November 29, the National Park Service ("NPS") issued a letter memorandum ("NPS Memorandum") outlining what activities

DBOC would be permitted to engage in during the 90 day wind-down period. SER 342.

On December 3, DBOC filed this action in the U.S. District Court for the Northern District of California, challenging the Secretary's decision and related conduct by NPS. ER 97. On December 4, NPS published a Federal Register notice ("FR Notice") converting Drakes Estero from "potential wilderness" to "designated wilderness." SER 317.

On December 7, Proposed Intervenors filed their Notice of Motion and Motion to Intervene. ER 161. On December 12, DBOC filed an *ex parte* application for a temporary restraining order ("TRO"), which was withdrawn that same day when Federal Defendants stipulated, and the district court ordered, that DBOC could continue specified operations (stringing and planting existing oyster spat in Drakes Estero) while DBOC's motion for a preliminary injunction was briefed and decided. SER 491; SER 5.

On December 21, DBOC filed its motion for a preliminary injunction, seeking to preserve the status quo operations of DBOC's oyster farm until the merits of the case are decided. SER 454. DBOC also opposed Proposed Intervenors' Motion to Intervene on the same day (ER 132), and filed its First Amended Complaint. SER 275.

On January 11, 2013, the district court vacated oral argument on the Motion to Intervene, finding Proposed Intervenors' Motion to be appropriate for decision without argument. SER 4. On January 25, the district court heard oral argument

on DBOC's Motion for a Preliminary Injunction and took the matter under submission.

On February 4, the district court issued its Order denying Proposed Intervenors' Motion to Intervene, while granting leave to participate as *amicus curiae* in the action, concluding that Proposed Intervenors had failed to show that the Federal Defendants would not adequately represent Proposed Intervenors' interests, and that Proposed Intervenors' ability to protect their interests would not be practically impaired if they did not intervene. ER 10-14. Also on February 4, the district court issued its Order denying DBOC's Motion for a Preliminary Injunction, concluding that it lacked jurisdiction and that some of the requirements for injunctive relief were not met. ER 3; ER 16.

On February 6, DBOC filed a notice of appeal from the order denying its Motion for a Preliminary Injunction. SER 111. One day later, DBOC filed a motion in the district court for an expedited ruling on a motion for injunction pending appeal. SER 94. On February 11, the district court denied DBOC's motion for an injunction pending appeal. SER 3.

On February 12, DBOC filed an emergency motion for an injunction pending appeal in this Court, seeking to enjoin the Federal Defendants from interfering with the continuing operations of DBOC's oyster farm until DBOC's appeal of the Order is decided. SER 63. On February 25, this Court issued an order granting the emergency motion "because there are serious legal questions and the balance of hardships tips sharply in appellants' favor. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011)." SER 1. Two

days later, on February 27, Proposed Intevenors filed a notice of appeal from the order denying their Motion for Intervention. ER 1.

V. STATEMENT OF FACTS

Proposed Intervenors and the Federal Defendants have viewed the oyster farm in the same way for decades. Until recently, they both thought the oyster farm should continue operating in perpetuity. Over the past few years, however, they have both changed position and come to share an unexplained obsession with booting out the oyster farm.

In the 1970s, Congress was considering wilderness legislation for Point Reyes. Federal Defendants urged Congress not to pass legislation that would be "inconsistent" with California's right to continue leasing Drakes Estero for oyster farming in perpetuity. SER 165-66. Congress agreed, and ultimately passed the 1976 Point Reyes Wilderness Act ("1976 Wilderness Act"), which provided that the farm would remain in Drakes Estero so long as California continued leasing the area for aquaculture.[1]

Environmental groups, led by Proposed Intervenor Environmental Action Committee of West Marin ("EAC"), urged the same result: any wilderness legislation should allow the oyster farm to continue in perpetuity. SER 542. In 1975, EAC helped write wilderness legislation that would "allow the *continued* use

[1] A full recitation of the history and intent of the 1976 Point Reyes Wilderness Act is beyond the scope of this appeal, but is described in pages 6-8 of the opening brief, and pages 11-14 of the reply brief, filed in the related case no. 13-15227.

and operation of [the oyster farm] in Drake's Estero." SER 542 (emphasis added).[2] EAC wrote that "such wilderness status does not in any way interfere with the manner in which the public presently uses [Point Reyes] park"—including the oyster farm. SER 543. At that time, EAC was not suggesting that the oyster farm should leave when the RUO expired in 2012; rather, EAC supported the recommendation of citizens' groups that the oyster farm should "continue unrestrained by wilderness designation", because it is "considered desirable by both the public and park managers." SER 542 (supporting recommendations of Citizens Advisory Commission for the Golden Gate National Recreation Area); SER 544 (Citizens Commission recommendation).[3]

Recently, however, Federal Defendants and Proposed Intervenors have changed position and gone to extremes to try to get rid of the oyster farm. They both reinterpret the 1976 Wilderness Act, and their own testimony to Congress, as somehow requiring that the oyster farm be removed at the expiration of the RUO. *See* ER 21:20-22:7 (Federal Defendants' 2004 opinion that 1976 Wilderness Act required removal of oyster farm); SER 223 (Proposed Intervenors' brief

[2] This letter explains EAC's support for S.2472, which is part of the legislative history of the 1976 Point Reyes Wilderness Act. *See* SER 145 (listing S.2472 as part of the legislative history of H.R.13160, which became Public Law No. 94-567).

[3] The statement by one of Proposed Intervenors' declarants, Amy Meyer, that the Citizens Commission expressed no "caveats in favor of the oyster farm operation", SER 240, ¶ 7, is contradicted by the historical record.

characterizing as "absurd" the argument that the 1976 Wilderness Act intended oyster farm to stay).[4]

Also, they both falsely accuse the oyster farm of causing serious harm to the environment. Other officials and agencies have roundly criticized Federal Defendants' false accusations of environmental harm. A 2008 investigation by the Interior Department's Inspector General found that the NPS had "misrepresented research" in "concerted attempts" to find environmental harm from the oyster farm's operations. SER 267. In 2009, the National Academy of Sciences found that the NPS had "selectively presented, over-interpreted, or misrepresented the available scientific information on potential impacts of [the oyster farm]". SER 358-59. In particular, the Academy found that NPS gave "an interpretation of the science that exaggerated the negative and overlooked the potentially beneficial effects", including the fact that the oysters "contribute to water filtration, the transfer of nutrients and carbon to the sediments, and biogeochemical cycling"—as they had done "for millennia until human exploitation eliminated them". SER 354. The Academy concluded "there is a lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero." SER 356. A later investigation by the Office of the Solicitor agreed that the NPS's "misconduct

[4] Proposed Intervenors continue to make this claim even though they have recently admitted that "the [1976] Wilderness Act says nothing about 2012". SER 322-23, ¶¶ 3-4, 7.

arose from incomplete and biased evaluation and from blurring the line between exploration and advocacy through research." SER 351.

In Appellants' Opening Brief ("AOB"), Proposed Intervenors carry on the Federal Defendants' campaign of false accusations:

Manila clams: Proposed Intervenors characterize the Manila clams grown at the oyster farm as "unpermitted," and assert that there is a "need for immediate removal of Manila clams" because they are "highly invasive." AOB 15, 18. But the clams are not "unpermitted"; California has permitted the oyster farm to grow these clams since 1993. SER 396-411. Nor do the California or Federal governments consider Manila clams to be an "invasive species."[5]

Dvex: Proposed Intervenors charge the oyster farm with risking the "further spread of a highly invasive colonial organism, *Didemnum vexillum* ('Dvex')." AOB 18. They neglect to mention, however, that Dvex is not unique to Drakes Estero; rather, it occurs commonly around the world and along the West Coast, and is known to exist in San Francisco Bay, Tomales Bay, and Bodega Bay. SER 357; SER 129, ¶68. Furthermore, it existed in Drakes Estero before DBOC began operations, has not expanded its range in Drakes Estero, and poses no threat to eelgrass. *Id.*, ¶¶67-72. According to the National Academy of Sciences, the Dvex

[5] *See* California Department of Fish and Wildlife, California Aquatic Invasive Species Management Plan, App. G at 74-78 (Jan. 2008) (listing all officially regulated "invasive" species, but not listing Manila clams), *available at* http://www.dfg.ca.gov/invasives/plan/ (last visited August 7, 2013).

would have attached to the abundant native oysters that were in Drakes Estero historically and are part of the ecological baseline. SER 355-56.

Harbor Seals: Proposed Intervenors charge that the oyster farm "will continue to disturb the important harbor seal breeding colony" in Drakes Estero. AOB 19. But there no evidence that the oyster farm has disturbed the seals. As the Proposed Intervenors know, the Federal Defendants took more than 300,000 photographs of a harbor-seal haulout area in Drakes Estero between 2007 and 2010. SER 261. These photographs were initially reviewed by a National Park Service employee, who did not find any evidence that DBOC disturbed seals. SER 349-50. Selected photographs were reviewed again by an independent harbor-seal behavior expert, retained by the National Park Service, who again found no evidence that DBOC operations were causing seal disturbances. SER 264. There is, however, evidence that the seals are disturbed, from time to time, by kayakers—perhaps the Proposed Intervenors themselves, who admit to kayaking regularly in the estero—and birds. *Id.*; ER 183 ¶ 7 (Proposed Intervenors' declarant reporting regularly kayaking in Drakes Estero); ER 189 ¶ 7 (same) ER 193 ¶ 7 (same).[6]

The false claims made in recent years by both Federal Defendants and Proposed Intervenors have attracted significant national attention. As the *New York Times* has reported: "flaws identified in the science may also have cost the

[6] The Proposed Intervenors have admitted to posting charges of environmental harm to their website that they knew were false. SER 323, ¶¶ 9-11, 326.

National Park Service, particularly the Point Reyes Scientists and their defenders, a substantial loss of professional credibility." SER 474.

VI. SUMMARY OF ARGUMENT

Proposed Intervenors do not meet the "very compelling showing" required to establish that the Federal Defendants are not adequately representing their interests in this action. When an intervenor-applicant shares the same interest or ultimate objective as the government, the intervenor-applicant must make a "'very compelling showing'" that the government is not adequately representing the applicant's interests. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (as amended) (quoting 7C Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1909, at 332 (1986)). Here, the Proposed Intervenors share the same interest and ultimate objective as the Federal Defendants. Thus, the "very compelling showing" standard applies.

The Proposed Intervenors never address, much less try to meet, the "very compelling showing" standard. Nor does the evidence they offer suffice. The Proposed Intervenors have acted in concert with the Federal Defendants in this litigation. None of the three briefs they have filed on the merits has disagreed with any of the arguments made by Federal Defendants. Nor have Proposed Intervenors advanced any substantively different position on the merits. Federal Defendants have made, and are capable and willing to make, all of the arguments now advanced by Proposed Intervenors. At most, Proposed Intervenors advance mere "differences in strategy" with Federal Defendants, but any such differences do not suffice to meet their burden. *See United States v. City of Los Angeles*, 288 F.3d

391, 402-03 (9th Cir. 2002) (stating rule). Because they have not met their burden on this element, Proposed Intervenors' application was properly denied by the district court.

The Proposed Intervenors argue that they are not required to make a "compelling showing" because they do not share the same interest and ultimate goal as the Federal Defendants. They make three arguments in support of this contention, but none are valid.

The Proposed Intervenors assert that their application should be judged by the three sub-factors that some courts consider to determine whether a proposed intervenor is adequately represented by an existing party: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086. But the Proposed Intervenors cannot meet their burden even on these sub-factors.

The district court's decision denying intervention should be affirmed.

VII. STANDARD OF REVIEW

A district court's order denying intervention as of right is reviewed *de novo*. *Perry*, 587 F.3d at 950.

VIII. INTERVENTION AS OF RIGHT UNDER FED. R. CIV. P. 24(A)

Federal Rule of Civil Procedure 24(a)(2) sets forth the standard for intervention as of right.

> On timely motion, the court must permit anyone to intervene who: . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Ninth Circuit summarizes the test for intervention as of right under Rule 24(a)(2) as follows:

> (1) [T]he [applicant's] motion must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 841 (9th Cir. 2011) (brackets in original; internal quotation marks and citations omitted). The applicant bears the burden of showing that each of the four elements is met, and failure to establish any one requirement is fatal to the application. *Id.* (citing *Perry*, 587 F.3d at 950).

On the fourth element, where the proposed intervenor and the party on whose side the proposed intervenor seeks to intervene "share the same 'ultimate objective,' a presumption of adequacy of representation applies." *Id.* (quoting *Perry*, 587 F.3d at 951). This presumption can only be rebutted by "'a compelling showing to the contrary.'" *Id.* (quoting *Perry*, 587 F.3d at 951).

The presumption is even stronger when an applicant "shares the same interest" as a government; in this situation, the proposed intervenor must make a

"very compelling showing." *Arakaki*, 324 F.3d at 1086 (internal quotation marks and citation omitted).

IX. ARGUMENT

A. Proposed Intervenors' Refusal To Meet The "Very Compelling Showing" Standard Is Fatal To Their Appeal

Failure to establish any one of the four requirements for intervention as of right "is fatal to the application." *Perry*, 587 F.3d at 950. Here, the Proposed Intervenors share the same interest as the Federal Defendants, and must therefore make a "very compelling showing" to intervene. *Arakaki*, 324 F.3d at 1086 (internal quotation marks and citation omitted). Yet the Proposed Intervenors do not argue that they have made a "very compelling showing" or even a "compelling showing." They argue, instead, that this standard does not apply to their application. But they are wrong; it does. And because they have not attempted to make the necessary "very compelling showing", they cannot establish one of the four requirements for intervention—which is "fatal to the application."

Although the Proposed Intervenors say nothing at all about making a "very compelling showing," they criticize the district court for applying the "compelling showing" standard. AOB 14-15 (district court's conclusion "was erroneous"), 20 (Proposed Intervenors do not have to make compelling showing), 21 n.6 (*Arakaki* does not contain "compelling showing" standard). Footnote 6 of the AOB is particularly noteworthy, because it selectively quotes *Arakaki* in support of the (dubious) proposition that *Arakaki* "does not actually contain" the standard that both *Perry* and the district court attributed to it. AOB 21 n.6. What footnote 6

ignores is the very next paragraph in *Arakaki*, which makes clear that a different, and more stringent, standard applies when the proposed intervenor shares the same interest as the government:

> There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. *City of Los Angeles*, 288 F.3d at 401. In the absence of a "very compelling showing to the contrary," it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. 7C Wright, Miller & Kane, § 1909, at 332.

Arakaki, 324 F.3d at 1086.[7] In *City of Los Angeles*, this Court explained that "this presumption [of adequate representation] arises when the government is acting on behalf of a constituency that it represents," but not when it is acting "as an employer." 288 F.3d at 401-02. Here, therefore, there is a presumption that the Federal Defendants adequately represent the Proposed Intervenors, and the Proposed Intervenors must make a "very compelling showing," or at the very least a "compelling showing," to overcome this presumption.

The Proposed Intervenors argue that the "compelling showing" standard would apply only if they and the Federal Defendants have the same "ultimate objective." AOB 20-21. But the case law is not as rigid as the Proposed Intervenors suggest. *Arakaki* presumed that a state adequately represents its

[7] Panels of this Court have not been perfectly consistent in applying the "very compelling showing" standard. *Compare Dep't of Fair Empl. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 740 (9th Cir. 2011) ("very compelling showing" required) *with Freedom from Religion Found., Inc.*, 644 F.3d at 841 (applying "compelling showing" standard to deny intervention).

citizens when the applicant "shares the same interest." 324 F.3d at 1086. Here, the Proposed Intervenors and Federal Defendants share the same interest and the same ultimate objective. They want to boot out the oyster farm as soon as possible.[8]

Nowhere do the Proposed Intervenors argue that they have made a "very compelling showing" or even a "compelling showing." In one isolated sentence, they assert that they have "made the requisite showing." AOB 21. But they never attempt to argue that their showing is in any way compelling.

And it plainly is not. Here the record leaves no doubt that the Proposed Intervenors and Federal Defendants are working together. The Federal Defendants and the Proposed Intervenors, for example, must have coordinated the briefs they filed on the same day in the district court, because each refers to the declarations of the other. SER 227 (Proposed Intervenors' Brief citing declaration filed by Federal Defendants that same day); SER 208 (Federal Defendants' brief citing declarations filed by Proposed Intervenors that same day). The three amicus briefs filed by Proposed Intervenors in response to DBOC's motion for a preliminary injunction gave them three opportunities to demonstrate that their arguments—in particular, their arguments on the merits—differed from those of the Federal Defendants. SER 210 (brief filed in district court); SER 45 (first brief filed in Ninth Circuit); SER 9 (second brief filed in Ninth Circuit). But those three amicus briefs did not

[8] The Proposed Intervenors argue that they do not share the same ultimate objective as the Federal Defendants. AOB 16-20. Section IX.B, below, responds to those arguments in detail.

take issue with anything asserted by the Federal Defendants, and did not advance any substantively different position on the merits. The Proposed Intervenors, therefore, cannot make a "very compelling showing" that their interests are so different that they are not adequately represented by the Federal Defendants.

Here, to paraphrase *Perry*, "[t]he reality is" that the Proposed Intervenors and Federal Defendants "have identical interests—that is, to uphold" the Federal Defendants' decision. *Perry*, 587 F.3d at 949. "Any differences are rooted in style and degree, not the ultimate bottom line." *Id*.

The district court correctly concluded that a presumption of adequate representation arises in this case such that Proposed Intervenors must make a "compelling showing to the contrary" to rebut. ER 10. The district court's ruling should be affirmed.

B. Proposed Intervenors Share The Same Ultimate Objective As The Federal Defendants.

The district court properly analyzed the ultimate objectives of both Proposed Intervenors' and Federal Defendants and found them to be the same: "the timely removal of [DBOC's] operations from Drakes Estero and protection of Drakes Estero as wilderness." ER 10. The district court's finding is consistent with how Proposed Intervenors themselves described their ultimate objective in their moving papers. There Proposed Intervenors explained: "[w]hile federal defendants, in determining the future management of Drakes Estero, *ultimately arrived* at the result sought by Proposed Intervenors, they did not do so as expeditiously as they could have . . . ." SER 561 (emphasis added); ER 11.

When the district court compared the objective and rationale of the Proposed Intervenors and the Federal Defendants, it found that they "correspond directly":

> Defendants' ultimate objective of removing Plaintiffs from Drakes Estero and the underlying rationale to protect wilderness correspond directly to the interest of Proposed Intervenors. While Proposed Intervenors may have a *more personal* interest, in that their members actually enjoy various recreational and aesthetic uses of Drakes Estero and may suffer 'direct harm' from the Company's continued operation (Mot. at 12; Reply at 3, 8), their primary asserted interest remains the protection of Drakes Estero as wilderness.

ER 11 (emphasis in original).

On appeal, Proposed Intervenors contend that they do not share the same ultimate objective with the Federal Defendants. AOB 16-20. In support of this contention, they make three arguments: that (1) the Federal Defendants have offered a limiting construction of a statute that is narrower than the one proposed by Proposed Intervenors, (2) Proposed Intervenors have a different interpretation of how quickly DBOC operations should be removed, and (3) Proposed Intervenors have a "narrow, parochial interest" different from the Federal Defendants. All three arguments are wrong.

1. Federal Defendants Have Not Offered A Limiting Construction Of A Statute.

First, the Proposed Intervenors argue that here, as in the *Lockyer* case, "Federal Defendants have offered 'a limiting construction of a statute that is narrower than that' of Proposed Intervenors." AOB 16-17 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 444 (9th Cir. 2006)). But the Proposed

Intervenors have "presented no evidence that the federal defendants actually *have urged* a narrow interpretation of the challenged statutes." *Freedom from Religion Found., Inc.*, 644 F.3d at 842 (emphasis in original).

DBOC's RUO specifically provides for a 90-day interval, after the expiration of the lease, for DBOC to remove its personal property. SER 393-94, ¶ 12 ("Any such property not removed from the reserved premises within 90 days after expiration of Vendor's reservation shall be presumed to have been abandoned and shall become the property of the United States of America . . . ."). Perhaps unsurprisingly, the Secretary's Memorandum granted DBOC a 90-day interval to wind-down operations. SER 335.

The Proposed Intervenors argue that their interpretation of the Wilderness Act is different from that of the Federal Defendants. AOB 17. In particular, they argue that the Secretary's decision violated the Wilderness Act by allowing "commercial" operations to continue during the 90-day wind-down period. *Id*. But in fact there is no difference. Both the Proposed Intervenors and the Federal Defendants have made the same arguments in response to DBOC's contention that the wilderness designation was invalid, and both have asserted that DBOC's continuing operations are not "commercial" operations prohibited by the Wilderness Act.

On December 4, 2012, the Federal Defendants published a notice in the Federal Register ("FR Notice") purporting to convert Drakes Estero from "potential wilderness" to "designated wilderness." SER 317. In its motion for a

preliminary injunction, DBOC claimed, *inter alia*, that Drakes Estero could not be converted to wilderness because all commercial uses prohibited by the Wilderness Act had not ceased within Drakes Estero, including harvesting of shellfish and planting of oyster spat. SER 487.

In response, Federal Defendants vigorously defended the validity of the FR Notice, contending that "all uses prohibited under the Wilderness Act within Drakes Estero *have* ceased" as of November 30, 2012, the date DBOC's lease expired. SER 205 (emphasis added) (quoting FR Notice). Federal Defendants also argued that the "limited authorization for onshore activities to minimize loss of the Company's personal property in no way constitutes continuing commercial operations in the waters of Drakes Estero, which is the portion of the Seashore converted from potential to designated wilderness as a result of the expiration and publication of the Notice." *Id.*

Proposed Intervenors filed a proposed Opposition to DBOC's motion for preliminary injunction, which the district court accepted as an amicus brief. ER 14 n.6. In that brief, they defended both the legality of the Federal Defendants' FR Notice, including the activities permitted within Drakes Estero, and the reasonableness of the Federal Defendants' approach to terminating DBOC's operations, including the 90-day wind-down period. SER 226. Proposed Intervenors specifically argued then that the FR Notice remained valid even if some of DBOC's commercial uses continued in Drakes Estero, because such uses were permissible under the Wilderness Act. *Id.* Proposed Intervenors also

rebuked DBOC for failing to recognize the "reasonable" nature of the Federal Defendants' 90-day wind-down period. "If DBOC believes that it is engaging in activities that violate the Wilderness Act, the proper course of action would be to refrain from such illegal activities immediately." *Id.*[9]

The evidence, therefore, leaves no doubt that the Proposed Intervenors cannot meet their burden of showing that they have a different interpretation of a statute. The supposed difference they now assert is contradicted by the brief they filed, which takes the exact same position as the Federal Defendants.[10] Nor have the Proposed Intervenors shown that the supposed difference is of any relevance to the litigation. Even if there really were a difference of opinion on the 90-day

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[9] Proposed Intervenors also applauded the response brief Federal Defendants filed in related Case No. 13-15277, in which Federal Defendants again defended the legality of the FR Notice. *See* Environmental Action Committee of West Marin, Park Service Briefing for Point Reyes Wilderness Case Underscores Oyster Company's Flawed Legal Theories (Apr. 4, 2013), *available at* http://eacmarin.org/wp-content/uploads/2013/04/Feds-Court-Appeals-Brief-Press-Release_Final1.pdf (last visited August 7, 2013).

[10] The Proposed Intervenors may be precluded from taking an inconsistent position by judicial estoppel, which "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *In re Hoopai*, 581 F.3d 1090, 1097 (9th Cir. 2009) (internal quotation marks and citations omitted). Proposed Intervenors' position on appeal is clearly inconsistent with their position before the district court where they successfully convinced the district court that the FR Notice was valid (ER 37 n.17), and Proposed Intervenors would derive an unfair advantage if allowed to take a contrary position on appeal.

wind-down, that wind-down has not been challenged by DBOC or the Proposed Intervenors and is not at issue in this litigation.[11]

The positions taken by the Proposed Intervenors—defending the legality under the Wilderness Act of activities permitted by the Federal Defendants in Drakes Estero, and the reasonableness of the Federal Defendants' 90-day wind-down period—demonstrate that the legal interpretations offered by both the Proposed Intervenors and the Federal Defendants are perfectly aligned in defense against DBOC's challenge.

2. Proposed Intervenors Do Not Have A Different Interpretation Of "Timely Removal."

Next, the Proposed Intervenors argue that "Proposed Intervenors take significant issue with Federal Defendants' views of what constitutes 'timely removal' of DBOC's operations." AOB 19. But they do not. The Federal Defendants wanted DBOC to be gone by now, and so do the Proposed Intervenors. Contrary to Proposed Intervenors' claims, the Federal Defendants have not demonstrated an inclination to take a "go-slow approach" to DBOC's removal. AOB 17, 19.

[11] The Proposed Intervenors talk about the "slow, accommodating pace at which the Federal Defendants have proposed to proceed" (AOB 24), but there is in fact no proposal in which the Federal Defendants propose to proceed at a slow, accommodating pace.

First, contrary to Proposed Intervenors' claim, and as explained above, the Secretary's Memorandum did not expand DBOC's time to remove its personal property. *See* AOB 17 (citing ER 48). In fact, DBOC was permitted 90 days to remove its personal property by the terms of the RUO. SER 393-94, ¶ 12. Accordingly, the fact that the Secretary's memorandum recognized a 90-day wind-down period already provided by the RUO cannot be construed as the Federal Defendants' intent to move slowly to remove DBOC.

Second, the December 14 stipulation between DBOC and the Federal Defendants (in which DBOC withdrew its application for a temporary restraining order) did not give DBOC permission to do anything it was not already allowed to do as of November 29 by the terms of both the Secretary's Memorandum and the NPS Memorandum. The stipulation simply acknowledged that DBOC could plant any oyster spat already existing in Drakes Estero onto oyster racks. SER 6, ¶ 1. Accordingly, the stipulation was not a concession, but simply a clarification of the rules established by the Federal Defendants on November 29.

Third, although the December 14 stipulation gave DBOC 15 days of additional time to remove its personal property, the Federal Defendants obtained from that stipulation the withdrawal of DBOC's TRO, and a briefing schedule that gave the Federal Defendants more time to oppose DBOC's Motion for Preliminary Injunction. SER 6, ¶¶ 2-4. Any disagreement the Proposed Intervenors may have with this stipulation is merely a quibble about past litigation tactics. "Divergence

of tactics and litigation strategy is not tantamount to divergence over the ultimate objective of the suit." *Perry*, 587 F.3d at 949.

Finally, Proposed Intervenors express concerns about what environmental effects DBOC's operations may have during the 90-day wind-down period with respect to Manila clams, Dvex, and harbor seals in Drakes Estero. As the district court recognized, these concerns are "primarily object[ions] to the speed at which Defendants are moving, not to the substantive arguments that they are likely to make in this litigation." ER 11. Moreover, Proposed Intervenors are wrong about these asserted "threats" to the environment. *See* Section V, above.

3. Proposed Intervenors Have Not Established That Their Purported "Narrow, Parochial Interest" Is Different From The Federal Defendants' Interest.

Lastly, the Proposed Intervenors argue that the Federal Defendants "'are required to represent a broader view than the narrow, parochial interests' of Proposed Intervenors." AOB 20 (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *overruled on other grounds*, *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc)).[12]

[12] In *Forest Conservation Council*, the State of Arizona and Apache County sought to intervene to defend their interest in limiting the scope of an injunction against timber harvesting sought by plaintiffs. 66 F.3d at 1499. This Court associated the "narrow, parochial interests" of Arizona and Apache County with those of the timber industry, which the Federal government did not adequately represent. *Id.* *Forest Conservation Council* is distinguishable because here the Federal Defendants adequately represent the Proposed Intervenors' interest in classifying Drakes Estero as wilderness and eliminating DBOC's operations.

But the Proposed Intervenors have not presented any evidence that their objective is any narrower or more parochial than that of the Federal Defendants.

As the Proposed Intervenors admit, the Federal Defendants "ultimately arrived at the result sought by Proposed Intervenors . . . ." SER 561. The defense of that result, against DBOC's challenge, is the goal shared in this litigation by the Proposed Intervenors and the Federal Defendants. Although the Proposed Intervenors complain that the Federal Defendants did not accomplish the result sought by Proposed Intervenors "as expeditiously as they could have" (*id.*), upon examination, Proposed Intervenors' asserted differing interests collapse into exactly what the district court found them to be: primarily a dispute as "to the speed at which Defendants are moving, not to the substantive arguments they are likely to make in this litigation." ER 11.

In fact, the Proposed Intervenors and the Federal Defendants could hardly be more closely aligned due to unique circumstances that present the inverse of those discussed by this Court's decision in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526, 528 (9th Cir. 1983) (cited by Proposed Intervenors, AOB 35-36). In that case, James Watt was head of the organization representing Sagebrush Rebellion in its suit against the Secretary of the Interior, until he became Secretary of the Interior. *Id.* at 529. Although he was presumably recused from participating in the actual litigation, this Court concluded that it could not "ignore the fact that Mr. Watt is a principal defendant in the case" or "assume that the Department of Justice is acting independent of Interior Department policy." *Id.*

According to the bio she submitted to the U.S. Senate for her confirmation hearings in early 2013, Secretary of the Interior Jewell was on the "Board of Trustees" of Proposed Intervenor National Parks Conservation Association ("NPCA").[13] Accordingly, Secretary Jewell was on the Board of Trustees of Proposed Intervenor NPCA at the time DBOC filed suit on December 3, 2012, when NPCA sought to intervene on December 7, and until she became Secretary of the Interior. As in *Sagebrush Rebellion, Inc.*, this Court should not ignore the fact that Secretary Jewell is a principal defendant in the case, or assume that the Department of Justice will act independent of Interior Department policy. 713 F.2d at 529.

The Proposed Intervenors, therefore, share the same objective as the Federal Defendants. The District Court's ruling should be affirmed.

C. The Proposed Intervenors Cannot Meet Their Burden On The Three Sub-Factors.

When considering whether a proposed intervenor has met the fourth element of the intervention test (adequacy of representation), a court sometimes considers three sub-factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a

[13] U.S. Senate Committee on Energy & Natural Resources, Biography of Sally Jewell, *available at* http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=0e8ba18f-972c-4478-8165-e9a1b9c94efa (last visited Aug. 7, 2013).

proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086. Here, the Proposed Intervenors cannot meet their burden to rebut with a "very compelling showing" on the three sub-factors that the Federal Defendants do not adequately represent their interests.

1. Federal Defendants Have Made, And Undoubtedly Will Make, All Of Proposed Intervenors' Arguments.

A motion for a preliminary injunction, by requiring the parties to argue about the likelihood of success on the merits, provides a preview of the principal legal issues in dispute. Here the Proposed Intervenors have filed three briefs in opposition to DBOC's motions for a preliminary injunction and for an injunction pending resolution of the appeal, and to DBOC's appeal of the trial court's denial of its motion for a preliminary injunction. In these three briefs, and in their opening brief on appeal, the Proposed Intervenors have had ample opportunity to identify those arguments they will make that the Federal Defendants will not. And what arguments have they identified? None.

Although the Proposed Intervenors dwell on the issue for six pages (AOB 22-28), nowhere do they identify a single argument that they would make that Federal Defendants have not. They assert that they "would have presented different arguments regarding the legal requirements governing DBOC's operations and set stricter standards for the removal of commercial operations." *Id*. at 24. But they did not, in fact, present any of these supposedly different arguments to the district court. Nor could they reasonably have presented these

supposedly different arguments, because they were not relevant to the proceedings before the trial court.

The Proposed Intervenors may be saying that they would have written the Secretary's decision differently. If that is their argument, it is unavailing because the drafting of that decision is not at issue. What is at issue is whether the Secretary's decision was illegal and should be overturned, and whether the Federal Defendants properly designated Drakes Estero as wilderness through the publication of the FR Notice. On those issues, they march in lock step.

The Proposed Intervenors may also be saying that they would not have agreed to the December 14 stipulation with which the Federal Defendants avoided a TRO hearing. But that is a mere difference in "litigation strategy or tactics" that does not suffice to allow intervention as of right. *Perry*, 587 F.3d at 954.

At the very end of the three sections on the three sub-factors (extending from pages 22 through 38 of the AOB), the Proposed Intervenors finally assert that they made an argument that the Federal Defendants did not. They argued to the trial court, they say, that "economic harm is not ordinarily irreparable for purposes of supporting injunctive relief." AOB 37. But the real issue before the District Court was whether Federal Defendants' decision to "destroy[]" DBOC's business constituted irreparable harm. ER 42. The Federal Defendants argued that DBOC had not demonstrated irreparable harm. SER 206. The District Court agreed with DBOC and found that the company would suffer irreparable harm in the absence of a preliminary injunction. ER 42. So this is what the "significant differences" between the Proposed Intervenors and the Federal Defendants (AOB 1) come

down to: The Proposed Intervenors made an argument that missed the main point in dispute.

Proposed Intervenors also state that they have sought to protect their particularized interests by submitting letters to the FGC and California Coastal Commission. AOB 25. None of these efforts have any bearing whatsoever on whether Proposed Intervenors' interests differ from the Federal Defendants' interests in this litigation. Proposed Intervenors are free to continue to pursue these activities regardless of whether they are parties to this lawsuit.

Finally, Proposed Intervenors argue that *Citizens for Balanced Use v. Montana Wilderness Association*, 647 F.3d 893 (9th Cir. 2011) ("*Citizens*"), "strongly supports" their position. AOB 26-27. But the case is easily distinguishable. In *Citizens*, the federal government and the proposed intervenors were adversaries in previous litigation that the proposed intervenors had won and the government was appealing. *Citizens*, 647 F.3d at 898-99. The case rejected the proposition that "ultimate objectives are identical where the Forest Service acted under compulsion of a district court decision gained by Applicants' previous litigation, and where the Forest Service is simultaneously appealing the decision that led them to adopt the now-challenged Interim Order." *Id*. at 899. Here, the Proposed Intervenors did not previously sue the Federal Defendants, nor have the Federal Defendants been acting under the compulsion of a court order. Instead, they have been joined at the hip for decades, first in favor of the oyster farm, and now against it. *See* Section V, above.

The Proposed Defendants, therefore, have not identified any of their arguments that the Federal Defendants will not make.

2. Federal Defendants Are Capable Of Making And Willing To Make Proposed Intervenors' Arguments.

In response to the second sub-factor ("whether the present party is capable and willing to make such arguments"), the Proposed Intervenors try to shift the burden away from themselves. They argue, first, that "there is no evidence" that the Federal Defendants will make the same arguments. AOB 28. But it is *their* burden to present a "very compelling showing to the contrary" sufficient to rebut the presumption that the Federal Defendants *will* make their arguments. This they have not done.

They also argue that it is not their burden "at this stage in the litigation to anticipate specific differences in trial strategy." AOB 30 (quoting *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001)). But that case, which predated *Arakaki*, did not apply either the "compelling showing" or "very compelling showing" standard because the party on whose side the applicant sought to intervene "acknowledge[d] that it will not represent proposed intervenors' interests in this action." *Ctr. for Biological Diversity*, 268 F.3d at 823 (brackets added; internal quotation marks and citation omitted). The Federal Defendants have made no such acknowledgment here, and so the case is distinguishable on that ground alone. More recent cases underscore that it is indeed a proposed intervenor's burden to make a "compelling showing" or "very compelling showing." *See* Sections IX.A and B, above.

The Proposed Intervenors argue that they "have distinct interests such that Federal Defendants will not undoubtedly make all of Proposed Intervenors' arguments." AOB 30. But these "distinct interests" are not distinct at all. Instead, they are vague assertions that the Federal Defendants might authorize oystering operations in the future, and that the Proposed Intervenors might object to these authorizations. But the Proposed Intervenors have provided no evidence to demonstrate any intent by the Federal Defendants to authorize any oystering operations in the future. Whatever differences there might have been about the 90-day wind-down period, there is no evidence whatsoever of any difference of opinion about the future.

The Proposed Intervenors also argue that "only the Proposed Intervenors can present evidence of the direct harm to their members." AOB 32. But the standard is not whether proposed intervenors will present new facts, but rather whether they will make new arguments. *Arakaki*, 324 F.3d at 1086-87. Intervention is not needed for the presentation of evidence. The Proposed Intervenors can present their evidence in the form of declarations, which can be submitted with amicus briefs or through the Federal Defendants—exactly as they have done so far. *See* AOB 35 ("Federal Defendants relied upon various of Proposed Intervenors' expert declarations in their briefing").

In short, the Proposed Intervenors have not demonstrated that the Federal Defendants are incapable of making, or unwilling to make, the arguments that the Proposed Intervenors would make.

3. The Proposed Intervenors Would Not Offer Any Necessary Elements.

In response to the third sub-factor ("whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect"), the Proposed Intervenors struggle to find something that might be characterized as a necessary element that the Federal Defendants might plausibly neglect. But they have nothing.

Seizing on the concept that evidence must be necessary, they rattle off the names of several people who have submitted declarations on their behalf. AOB 35. But they provide no evidence that the Federal Defendants would neglect these people; on the contrary, they admit that the Federal Defendants have relied on them. *Id*.

They argue that intervention as of right is appropriate when a party has special expertise "'and offers a perspective which differs materially from that of the present parties.'" AOB 36 (quoting *Sagebrush Rebellion, Inc.*, 713 F.2d at 528). But they make no attempt to show that their perspective differs materially.

In *Prete v. Bradbury*, this Court explained that a bare allegation that the government lacks knowledge within the control of the proposed intervenor is insufficient, especially where the government defendant is familiar with the subject matter. 438 F.3d 949, 958 (9th Cir. 2006). Instead, the proposed intervenor must show that the government could not "acquire additional specialized knowledge through discovery (*e.g.*, by calling upon intervenor-defendants to supply evidence) or through the use of experts." *Id.* at 958 & n.13 (a proposed intervenor's first-

hand knowledge "*may support* a trial judge's discretionary grant of permissive intervention, but it is not sufficient *by itself* to support intervention as of right in this case" (emphasis in original)).

Here, the Federal Defendants include the Department of the Interior ("Interior") and the NPS. Both Interior generally, and NPS specifically, have access to a wealth of expertise, from subject-matter experts in various disciplines across the country, to Point Reyes National Seashore staff with personal experience with DBOC.[14] Proposed Intervenors point to declarations it has submitted by declarants on oceanography, ecology, biology, acoustics, PRNS history, and beach surveys. AOB 34-35. Yet Proposed Intervenors make no showing whatsoever that the Federal Defendants, with approximately 70,000 employees, lack equivalent expertise. For example, it defies belief that three Interior Department agencies that have been actively involved in this matter, including the NPS, U.S. Geological Survey, and U.S. Fish & Wildlife Service, lack equivalent (or superior) expertise in the areas Proposed Intervenors claim to have offered.

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[14] Interior's website offers that it employs "about 70,000 people in approximately 2,400 locations with offices across the United States, Puerto Rico, U.S. Territories, and Freely Associated States." U.S. Department of the Interior, Employees, *available at* http://www.doi.gov/employees/index.cfm (last visited Aug. 7, 2013). Interior includes the Bureaus of Indian Affairs, Land Management, Ocean Energy Management, Reclamation, and Safety and Environmental Enforcement; the National Park Service; the Office of Surface Mining, Reclamation and Enforcement; the U.S. Fish and Wildlife Service; and the U.S. Geological Survey.

Finally, on the last two pages of the Proposed Intervenors' brief, they assert that they made an argument below that the Federal Defendants did not regarding whether DBOC would suffer irreparable harm without a preliminary injunction. But the argument missed the point and was rejected. *See* Section IX.C.1, above.[15]

Even assuming that the Federal Defendants did not defend the motion "in the exact manner that the [proposed intervenor] would," that difference is not a showing that the Federal Defendants "have conceded any '*necessary* elements to the proceeding.'" *Perry*, 587 F.3d at 954 (emphasis in original) (quoting *Arakaki*, 324 F.3d at 1086); *see City of Los Angeles*, 288 F.3d at 402-03 ("Any differences they have are merely differences in strategy, which are not enough to justify intervention as a matter of right.").

The Proposed Intervenors, therefore, have not carried their burden on any of the three sub-factors. They have not made a "compelling showing," much less a "very compelling showing," that their interests will not be adequately represented by the Federal Defendants. The trial court should be affirmed.

D. The Proposed Intervenors' Interests Would Not Be Practically Impaired.

The district court found, as an independent reason for denying intervention, that Proposed Intervenors' ability to protect their interests would not be

[15] Proposed Intervenors are mistaken that they alone argued that DBOC's harms were self-inflicted—the Federal Defendants made the same argument. *Compare* AOB 37 *with* SER 206.

"practically impaired if they do not intervene." ER 13. Here, the district court found that the Federal Defendants share the same "ultimate objective of removing Plaintiffs from Drakes Estero and the underlying rationale to protect wilderness correspond[s] directly to the interest of Proposed Intervenors." ER 11. That ruling was correct.

The Proposed Intervenors argue that they "would see their interests impaired or impeded *if the court were to rule in DBOC's favor*." AOB 40 (emphasis added). But that is quite different from the issue they raised in their Statement of Issues: "Whether the district court erred in finding that Proposed Intervenors' ability to protect their interests in this litigation will not be practically impaired *if they are not allowed to intervene*." AOB 3 (emphasis added). The district court resolved the latter issue. It concluded that denial of intervention would not, as a practical matter, impair the interests of the Proposed Intervenors. Why not? Because the Proposed Intervenors had not identified anything of substance that they would do in the litigation that would protect their interests any better than the Federal Defendants would protect those interests. That conclusion was plainly right. If there was an error in the district court's analysis, it was harmless.

X. CONCLUSION

Proposed Intervenors have not made the "very compelling showing," or even a "compelling showing," required to rebut the presumption that they are adequately represented by the Federal Defendants. This refusal to make the

necessary showing is fatal to their application to intervene. The district court's Order should be affirmed.

DATED: August 7, 2013

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CIRCUIT RULE 28-2.6 STATEMENT OF RELATED CASES

Plaintiff-Appellees state that there is a related case on file in this Court, to wit, *Drakes Bay Oyster Company, et al. v. Jewell, et al.*, Case No. 13-15277, which arises out of the same district court case and addresses the question of whether the district court erred in denying Plaintiff-Appellees' motion for a preliminary injunction.

RULE 32 CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because:

✓ this brief contains 9,245 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

__ this brief uses a monospaced typeface and contains ____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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DATED: August 7, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 7, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: August 7, 2013

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