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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DRAKES BAY OYSTER COMPANY, *et al.*,

Plaintiffs,

vs.

KENNETH L. SALAZAR, in his official  
capacity as Secretary, U.S. Department of the  
Interior, *et al.*,

Defendants.

Case No.: 12-cv-06134-YGR

**ORDER DENYING MOTION TO INTERVENE  
(DKT. NO. 11); AND DENYING PLAINTIFFS’  
ADMINISTRATIVE MOTION TO STRIKE (DKT.  
NO. 83)**

Plaintiffs Drakes Bay Oyster Company (the “Company”) and Kevin Lunny (“Lunny” and collectively, “Plaintiffs”) initiated this action requesting that the Court declare void and unlawful the November 29, 2012 Memorandum of Decision of Defendant Kenneth L. Salazar, Secretary of the U.S. Department of the Interior (“Secretary”), in which he decided not to grant Plaintiffs a permit to allow for the continued operation of their oyster farm (“Decision”). Plaintiffs ask the Court to order the Secretary to direct the National Park Service (“Park Service”) to issue the Company the 10-year special use permit which the Secretary denied in the November 29, 2012 Decision. Plaintiffs have also moved for a preliminary injunction preventing enforcement of the Secretary’s Decision, which would allow them to continue operating their oyster farm until the Court decides the merits of the lawsuit.

Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, and Save Our Seashore (collectively, “Proposed Intervenors”) have filed a Motion to Intervene (“Motion”) in this action as Defendants on the ground that they are entitled to intervene as of right. (Dkt. No. 11-1.) Proposed Intervenors argue that they are entitled to intervene because they have been deeply involved in the Defendant U.S. Department of the Interior’s

United States District Court  
Northern District of California

1 process to inform the Secretary's Decision, and this lawsuit not only threatens to undermine their  
 2 successful efforts, but intervention will ensure that their longstanding interests are represented and  
 3 protected. Alternatively, they ask the Court to grant permissive intervention.

4 Plaintiffs filed an Opposition to Environmental Action Committee of West Marin, *et al.*'s  
 5 Motion to Intervene ("Opposition"). (Dkt. No. 41.) Defendants filed a Statement of Non-Opposition  
 6 to Motion to Intervene. (Dkt. No. 53.) Proposed Intervenors thereafter filed their Reply in Support of  
 7 Motion to Intervene ("Reply"). (Dkt. No. 56.)

8 Having carefully considered the papers submitted and the pleadings in this action,<sup>1</sup> and for the  
 9 reasons set forth below, the Court hereby **DENIES** the Motion to Intervene, but **GRANTS** Proposed  
 10 Intervenors the ability to seek leave to participate as amicus curiae in this action as set forth herein.

#### 11 **I. BACKGROUND<sup>2</sup>**

12 In 1962, Congress created the Point Reyes National Seashore ("Seashore"), and placed it  
 13 under the administrative authority of the Secretary of the Interior. Pub. L. No. 87-657, 76 Stat. 538,  
 14 (codified at 16 U.S.C. §§ 459c *et. seq.*) (1962). Two years later, Congress passed the Wilderness Act,  
 15 which directed the Secretary of the Interior to identify the suitability of certain national park acreage  
 16 for wilderness designation. 16 U.S.C. § 1132(c). Then, in 1976, Congress enacted the Point Reyes  
 17 Wilderness Act, designating particular acres of the Seashore as potential wilderness. Pub. L. No. 94-  
 18 544, 90 Stat. 2515 (1976). Drakes Estero is located within the Seashore.

19 Plaintiff Kevin Lunny and his wife Nancy Lunny currently own the Company, which is  
 20 located on the shore of Drakes Estero. (First Amended Complaint for Declaratory and Injunctive  
 21 Relief (Dkt. No. 44) ("FAC") ¶ 2.) In December 2004, the Company, Kevin Lunny, and Nancy  
 22 Lunny purchased their oyster farm from the Johnson Oyster Company. (FAC ¶ 3.) At the time of the  
 23 purchase, Johnson Oyster Company operated the oyster farm pursuant to a 40-year Reservation of Use  
 24 and Occupancy ("Reservation") with the Park Service for 1.5 acres of land on the Drakes Estero

25 <sup>1</sup> The Court previously found the pending Motion to be appropriate for decision without oral argument  
 26 pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b) and vacated the hearing  
 scheduled for January 15, 2013. (Dkt. No. 78.)

27 <sup>2</sup> This background section is intended to summarize pertinent facts and allegations relevant to the pending  
 28 Motion, and is not intended to provide an exhaustive summary of the factual or procedural background in this  
 action.

1 shore. (*Id.*) Johnson Oyster Company had previously granted, in 1972, fee title of the 1.5 acres of  
2 shore to the United States, subject to the Reservation. (*Id.* ¶ 39.) The Reservation had an expiration  
3 date of November 30, 2012, but allowed for the potential issuance of a special use permit upon the  
4 expiration date. (*Id.* ¶¶ 3 & 39.)

5 In 2009, Congress enacted Section 124 of the Department of the Interior, Environment, and  
6 Related Agencies Appropriations Act of 2010. Pub. L. No. 111-88 § 124, 123 Stat. 2904, 2932  
7 (2009) (“Section 124”). Section 124 provided, in part: “Prior to the expiration on November 30, 2012  
8 of the Drake’s Bay Oyster Company’s Reservation of Use and Occupancy and associated special use  
9 permit (‘existing authorization’) within Drake’s Estero at Point Reyes National Seashore,  
10 notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a  
11 special use permit with the same terms and conditions as the existing authorization, except as  
12 provided herein, for a period of 10 years from November 30, 2012.” Plaintiffs applied for the special  
13 use permit from the Park Service in July 2010 (“New SUP”). (FAC ¶ 47.) In response to Plaintiffs’  
14 application, the Park Service prepared a Draft Environmental Impact Statement in 2011 and a Final  
15 Environmental Impact Statement in 2012. (*Id.* ¶¶ 57 & 97.)

16 On November 29, 2012, Secretary Salazar issued a Memorandum of Decision stating that the  
17 Company would not be issued a New SUP. (FAC ¶¶ 11, 14.) The Secretary stated that he was  
18 effecting the intent of Congress, as stated in the 1976 Point Reyes Wilderness Act, to designate  
19 Drakes Estero as wilderness. (*Id.* ¶¶ 130–132.) The Decision instructed the Park Service to publish a  
20 notice in the Federal Register of the conversion of Drakes Estero from potential to designated  
21 wilderness, and instructed the Company to remove personal property within 90 days and to cease  
22 commercial activities in Drakes Estero after November 30, 2012. (*Id.* ¶ 14.)

## 23 II. LEGAL STANDARD

24 Intervention is a procedure by which a nonparty can gain party status without the consent of  
25 the original parties. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009)  
26 (“intervention is the requisite method for a nonparty to become a party to a lawsuit”). There are two  
27 types of intervention: intervention of right and permissive intervention. Intervention exists as a  
28 matter of right when a federal statute confers the right to intervene or the applicant has a legally

1 protected interest that may be impaired by disposition of the pending action and that interest is not  
2 adequately represented by existing parties. Fed. R. Civ. P. 24(a). Permissive intervention may be  
3 allowed at a court's discretion when a federal statute confers a conditional right to intervene, or the  
4 applicant's claim or defense and the main action share a common question of law or fact. Fed. R. Civ.  
5 P. 24(b).

### 6 **III. DISCUSSION**

7 Proposed Intervenors seek to intervene, both as a matter of right and permissively under sub-  
8 sections (a) and (b) of Federal Rule of Civil Procedure 24. Plaintiffs oppose intervention. Defendants  
9 "have no objection" to the Motion. (Dkt. No. 53.)

#### 10 **A. INTERVENTION OF RIGHT**

11 Courts in the Ninth Circuit apply a four-part test to determine whether intervention should be  
12 granted as a matter of right: (1) the applicant must assert a "significantly protectable" interest relating  
13 to the property or transaction that is the subject of the action; (2) the applicant's interest must be  
14 inadequately represented by the parties to the action; (3) disposition of the action without intervention  
15 may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's  
16 motion must be timely. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998); *Cabazon Band of*  
17 *Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997). The applicant bears the burden of  
18 establishing *all* of the criteria, and the rule is construed "broadly, in favor of the applicant for  
19 intervention." *Donnelly*, 159 F.3d at 409. Failure to satisfy any one of the requirements is fatal to the  
20 application, and a court need not reach the remaining elements if one of the elements is not satisfied.  
21 *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

22 The Court notes that while Plaintiffs generally contend that Proposed Intervenors cannot meet  
23 their burden of establishing the requirements for intervention as of right (Opp. at 1), their substantive  
24 response is directed only to the adequacy of representation element (*id.* at 5–12). The Court will  
25 nonetheless address each element.

#### 26 **1. First Element: "Significantly Protectable" Interest**

27 To determine whether an applicant has a "significantly protectable" interest necessary  
28 for intervention, the Court must consider: (i) whether the interest is protectable under some law; and

1 (ii) whether there is a relationship between the legally protected interest and the claims at issue.  
 2 *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011). A would-be intervenor  
 3 must demonstrate generally it “has a sufficient interest for intervention purposes if it will suffer a  
 4 practical impairment of its interests as a result of the pending litigation.” *California ex rel. Lockyer v.*  
 5 *United States*, 450 F.3d 436, 441 (9th Cir. 2006). “Although the intervenor cannot rely on an interest  
 6 that is wholly remote and speculative, the intervention may be based on an interest that is contingent  
 7 upon the outcome of the litigation.” *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir.  
 8 2010) (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995)); *see also United*  
 9 *States v. Aerojet General Corp.*, 606 F.3d 1142, 1150 (9th Cir. 2010).

10 In the environmental law context, the Ninth Circuit has identified at least two factors that  
 11 weigh in favor of finding that a “significantly protectable interest” exists: (1) a group has an interest  
 12 in seeing a wilderness area preserved for the use and enjoyment of its members, or (2) the group  
 13 actively participates in the administrative process leading to the litigation. *See e.g. Wilderness Soc.*,  
 14 630 F.3d at 1180; *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897–98 (9th  
 15 Cir. 2011); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526–27 (9th Cir. 1983). In *Citizens for*  
 16 *Balanced Use*, proposed intervenors’ interest was the ability to conserve and enjoy wilderness in the  
 17 study area. The Court held such interest would be practically impaired as a result of the litigation.  
 18 647 F.3d at 898.<sup>3</sup>

19 Proposed Intervenors are “public interest environmental organizations . . . that have worked  
 20 for years to protect the natural resources of [the Seashore] and Drakes Estero.” (Mot. at 5.) They  
 21 claim an interest in Drakes Estero’s ecological, biological, scientific, scenic, recreational, and  
 22 aesthetic resources. (Mot. at 6.) Specifically, their members, staff, and officers regularly visit Drakes  
 23 Estero for hiking, kayaking, wildlife observation, beachcombing, nature education, and other quiet-  
 24 use activities. (*Id.* at 5; Declaration of Gordon Bennett in Support of Motion to Intervene (“Bennett  
 25 Decl.”) ¶¶ 3, 7; Declaration of Neal Desai in Support of Motion to Intervene (“Desai Decl.”) ¶¶ 3, 7;  
 26 Declaration of Amy Elizabeth Trainer in Support of Motion to Intervene (“Trainer Decl.”) ¶¶ 3, 8;

27  
 28 <sup>3</sup> *See also Sagebrush Rebellion*, 713 F.2d at 526–27 (intervenor-group devoted to the protection of birds and other animals had actively participated in administrative process leading to the litigation, and therefore had significantly protectable interest).

1 Declaration of Johanna Wald in Support of Motion to Intervene (“Wald Decl.”) ¶¶ 3, 7 (*see* Dkt. Nos.  
 2 11 & 12.) Proposed Intervenor assert their interests are protectable under four “environmental, land  
 3 management, and procedural statutes”: (1) the Wilderness Act of 1964 and the Point Reyes  
 4 Wilderness Act of 1976; (2) National Park Service Management Policies; (3) the National  
 5 Environmental Policy Act; and (4) the Administrative Procedure Act. (Mot. at 6–7.)

6 Plaintiffs’ Opposition does not address this factor substantively. The Court finds that  
 7 Proposed Intervenor have established a significantly protectable interest under Fed. R. Civ. P. 24(a).  
 8 Proposed Intervenor have established they have an interest in seeing Drakes Estero preserved for the  
 9 use and enjoyment of its members. As noted above, a proposed intervenor could generally  
 10 demonstrate a sufficient interest for intervention as of right in a NEPA action, as in all cases, if “it will  
 11 suffer a practical impairment of its interests as a result of the pending litigation.” *Wilderness Soc.*,  
 12 630 F.3d at 1179 (citing *California ex rel. Lockyer*, 450 F.3d at 441). In addition, Proposed  
 13 Intervenor in this case have participated in the administrative process leading to this litigation. (*See*  
 14 Bennett Decl. ¶ 6; Desai Decl. ¶ 6; Trainer Decl. ¶ 6; Wald Decl. ¶ 6.) They have also been involved  
 15 in a field survey at and near Drakes Estero to document alleged environmental damage caused by  
 16 Drakes Bay Oyster Company’s operations. (*See* Bennett Decl. ¶¶ 7, 9.)

17 According to Proposed Intervenor, the relief sought by Plaintiffs “would result in undoing all  
 18 of Proposed Intervenor’s efforts to ensure that no further permit for oyster cultivation in Drakes  
 19 Estero be granted after the existing reservation of use and occupancy ended[.] . . . Granting the relief  
 20 that plaintiffs seek would directly harm [their] interest in the Estero receiving [a] wilderness  
 21 designation and protection . . . and thus, in their use and enjoyment of the Estero.” (Mot. at 8.) The  
 22 Court agrees that Proposed Intervenor’s interests, as identified in this Motion, are sufficiently related  
 23 to the claims at issue in this action.

## 24 **2. Second Element: Adequate Representation by Existing Parties**

25 The parties contest the adequacy of representation element. The Court considers three  
 26 factors: (1) whether the interest of the present party is such that it will undoubtedly make all of a  
 27 proposed intervenor’s arguments; (2) whether the present party is capable and willing to make such  
 28 arguments; and (3) whether a proposed intervenor would offer any necessary elements to the

1 proceeding that other parties would neglect. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.  
2 2003) (citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)). “The  
3 ‘most important factor’ to determine whether a proposed intervenor is adequately represented by a  
4 present party to the action is ‘how the [intervenor’s] interest compares with the interests of existing  
5 parties.’” *Perry*, 587 F.3d at 950–51 (quoting *Arakaki*, 324 F.3d at 1086 (internal citations omitted)).  
6 Generally, the burden on the would-be intervenor is minimal as it merely needs to show that  
7 representation of the interest by existing parties *may* be inadequate. *Arakaki*, 324 F.3d at 1086 (citing  
8 *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). However, “[w]here the party and  
9 the proposed intervenor share the same ‘ultimate objective,’ a presumption of adequacy of  
10 representation applies, and the intervenor can rebut that presumption only with a ‘compelling  
11 showing’ to the contrary.” *Perry*, 587 F.3d at 951 (quoting *Arakaki*, 324 F.3d at 1086). Similarly,  
12 there is an assumption of adequacy when the government is acting on behalf of a constituency that it  
13 represents because it is presumed that the government adequately represents its citizens when the  
14 applicant shares the same interest. *Arakaki*, 324 F.3d at 1086 (citing *United States v. City of Los*  
15 *Angeles* (“*City of Los Angeles*”), 288 F.3d 391, 401 (9th Cir. 2002)); *Gonzalez v. Arizona*, 485 F.3d  
16 1041, 1052 (9th Cir. 2007).

17 Proposed Intervenors argue that the existing parties do not adequately represent their interests.  
18 Proposed Intervenors’ interests are in direct conflict with Plaintiffs. (Mot. at 10.) As to existing  
19 Defendants, Proposed Intervenors contend that their interests are inadequately represented because the  
20 United States is likely to abandon or concede a potentially meritorious argument or interpretation of a  
21 statute. (Mot. at 10; Reply at 3.) Stating that it is not their burden to anticipate the specific  
22 differences between themselves and Defendants, Proposed Intervenors argue they have met their  
23 burden by simply showing it is likely that Defendants will not advance the same arguments as they  
24 would. (Mot. at 11 (citing *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th  
25 Cir. 2001)).)

26 As to the specific differences in arguments that are likely to result, Proposed Intervenors  
27 identify: (i) their “unique environmental perspective” which is not represented by any other party; and  
28 (ii) the fact that Defendants have not acted “as expeditiously as they could have,” to the detriment of

1 ecological health and restoration of the Estero “in the short term.” Proposed Intervenor also suspect  
2 that Defendants may “temper their legal positions against [P]laintiffs . . . because they must work with  
3 them during the 90-day transition period (and perhaps beyond that time on certain post-closure  
4 issues)” and/or may be more persuaded by the broader public interest in making strategic decisions in  
5 this litigation. (Mot. at 11; Reply at 4 (“Proposed Intervenor would have presented different  
6 arguments regarding the legal requirements governing [the Company’s] operations and set stricter  
7 standards for the removal of commercial operations at the site to protect the ecological health of the  
8 Estero and allow for its restoration as quickly as possible.”).)

9 Plaintiffs disagree and assert that Defendants and Proposed Intervenor have the same ultimate  
10 objective of removing the Company’s operations from Drakes Estero, and thus a presumption of  
11 adequacy of representation applies that Proposed Intervenor have failed to rebut. (Opp. at 6.)  
12 Plaintiffs characterize Defendants and Proposed Intervenor as taking positions that are “near-  
13 identical” or “closely echo” each other, and describe Defendants as having zealously pursued the  
14 Company’s removal such that full wilderness can be achieved in Drakes Estero. (*Id.* at 2–3 & 8.) In  
15 addition, Plaintiffs argue that Defendants have demonstrated a willingness to make the same  
16 arguments and statutory constructions as Proposed Intervenor. (*Id.* at 11.) To the extent that  
17 Proposed Intervenor attempt to argue that Defendants are likely to and/or have already abandoned  
18 potentially meritorious arguments that Proposed Intervenor would have made, Plaintiffs respond that  
19 inadequacy is not established where the intervenor seeks to offer a variation on an argument or would  
20 follow a different litigation strategy. (*Id.* at 10–11.) Finally, Plaintiffs argue that Proposed  
21 Intervenor will not offer any elements *necessary* to this matter that Defendants would otherwise  
22 neglect. (*Id.* at 11–12.)

23 The Court agrees with Plaintiffs. Proposed Intervenor and Defendants share the same  
24 ultimate objective here: the timely removal of the Company’s operations from Drakes Estero and  
25 protection of Drakes Estero as wilderness.<sup>4</sup> As such, a compelling showing is required to rebut the  
26 presumption. *Perry*, 587 F.3d at 951. Proposed Intervenor have failed to meet this standard for four  
27 reasons.

28 <sup>4</sup> In recognizing that a presumption of adequacy of representation applies here, Proposed Intervenor seem to  
concede that Defendants’ and Proposed Intervenor’s ultimate objective is the same. (Reply at 2.)

1           *First*, Proposed Intervenors primarily object to the speed at which Defendants are moving, not  
2 to the substantive arguments that they are likely to make in this litigation. Proposed Intervenors argue  
3 that Defendants have not acted “as expeditiously as they could have” by permitting an additional 90-  
4 day period to wind down the Company’s operations after the date of the Secretary’s Decision. (Mot.  
5 at 11; Reply at 7.) Proposed Intervenors also object to a December 14, 2012 Stipulation (Dkt. No.  
6 29), in which the Secretary agreed that the Company could conduct certain activities as part of the  
7 wind-down of business and permitted an additional fifteen days so that Plaintiffs could remove all  
8 personal property from the area. (*See* Dkt. No. 31 (Order Granting Stipulation).) Proposed  
9 Intervenors “do not believe that such [extensions] are consistent with the Wilderness Act” and that  
10 “immediate cessation” of the Company’s operations is proper. (Reply at 8.) This same rationale  
11 appears to underlie Proposed Intervenors’ argument that Defendants may “temper” its position with  
12 Plaintiffs because the parties will need to coordinate transition and closure issues. Such *potential*  
13 tempering, at this juncture, is speculative and not sufficient to rebut the presumption of adequacy.

14           *Second*, Defendants share interests with Proposed Intervenors such that Defendants are likely  
15 to make all of the substantive arguments that Proposed Intervenors would make. Defendants seek to  
16 remove Plaintiffs from Drakes Estero to allow for the designation of Drakes Estero as full wilderness  
17 and, consequently, Defendants have denied Plaintiffs’ request for a New SUP that would have  
18 permitted the Company to remain. Defendants’ ultimate objective of removing Plaintiffs from Drakes  
19 Estero and the underlying rationale to protect wilderness correspond directly to the interest of  
20 Proposed Intervenors. While Proposed Intervenors may have a *more personal* interest, in that their  
21 members actually enjoy various recreational and aesthetic uses of Drakes Estero and may suffer  
22 “direct harm” from the Company’s continued operation (Mot. at 12; Reply at 3, 8), their primary  
23 asserted interest remains the protection of Drakes Estero as wilderness.<sup>5</sup> At best, Proposed

24 <sup>5</sup> The Ninth Circuit has stated that inadequate representation is more likely to be found when the intervenor-  
25 applicant asserts a personal interest that does not belong to the public at large, and that government agencies  
26 may be required to represent a broader view of the public interest than the more narrow, parochial or economic  
27 interests of private parties. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir.  
28 1995). However, numerous cases post-dating *Forest Conservation* finding inadequacy based on intervenor-  
applicants’ narrower personal interest are distinguishable. *Southwest Ctr. for Biological Diversity*, 268 F.3d at  
823 (City defendant acknowledged that it would not represent proposed intervenors’ interests and government  
defendants generally could not be expected to protect private, for-profit motive interests under the  
circumstances); *California ex rel. Lockyer*, 450 F.3d at 444–45 (making compelling showing of inadequacy

1 Intervenor will offer an additional “environmental perspective” to the elements—it is not that  
2 Defendants will abandon such argument merely because Defendants themselves do not personally  
3 enjoy uses of the area. (*See* Reply at 4 (“Proposed Intervenors have sought to protect their  
4 particularized interests by taking steps *above and beyond* what Defendants have required”) (emphasis  
5 supplied).)

6 *Third*, Proposed Intervenors have failed to establish that the personal perspective or differing  
7 expertise that they bring to this action is necessary to the elements of the proceedings. To the  
8 contrary, Proposed Intervenors will only bring a different “point of view.” (Reply at 9.) Proposed  
9 Intervenors have not identified how Defendants’ representation would be deficient, in and of itself, to  
10 protect their interest in having the Company removed and protecting wilderness areas.

11 *Fourth*, to the extent that Proposed Intervenors have identified any “difference” in argument  
12 that Defendants did or will not make in this action, the Court finds these differences are best  
13 characterized as either a “dispute over litigation strategy or tactics” or a “minor difference[] in  
14 opinion,” similar to the differing strategy calls in *Perry*. 587 F.3d at 954 (citing *City of Los Angeles*,  
15 288 F.3d at 402–03 and *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir.  
16 1996)). Differences in strategic approaches or claims that the existing party “may not defend . . . in  
17 the exact manner that [intervenor-applicants] would” are insufficient to show that the existing party  
18 has conceded *necessary* elements to the proceeding. *Perry*, 587 F.3d at 954 (addressing various  
19 stipulations on evidence that intervenor-applicants argued they would not have agreed to).

20 For the foregoing reasons, the Court finds that Plaintiffs have failed to rebut the presumption  
21 that Defendants will adequately represent Proposed Intervenors’ interests in this action.

### 22 **3. Third Element: Effect on Proposed Intervenors’ Ability to Protect Their** 23 **Interests**

24 The next element examines whether disposition of the action without intervention may  
25 as a practical matter impair or impede its ability to protect that interest. *Donnelly*, 159 F.3d at 409.

26 where there was evidence that the government “will take a position that actually compromises (and potentially  
27 eviscerates)” the protections sought by intervenor-applicants); *Citizens for Balanced Use*, 647 F.3d at 899–900  
28 (overcoming presumption of adequacy where, among other things, there were “fundamentally differing points  
of view between Applicants and the Forest Service on the litigation as a whole”). Here, Proposed Intervenors  
are public interest environmental organizations seeking to protect the natural resources of Drakes Estero and  
Proposed Intervenors have failed to show that Defendants have fundamentally differing interests.

1 Proposed Intervenors assert that the relief sought by Plaintiffs would have a “significant adverse  
2 impact” on their work to defend and preserve the extraordinary natural resources of Drakes Estero.  
3 (Mot. at 9; *see* Bennett Decl. ¶¶ 4–6; Desai Decl. ¶¶ 5–6; Trainer Decl. ¶¶ 5–6; Wald Decl. ¶¶5–6.) It  
4 would also harm their ability to use and enjoy the area. (Mot. at 9; *see* Bennett Decl. ¶ 10; Desai  
5 Decl. ¶ 10; Trainer Decl. ¶ 9; Wald Decl. ¶ 10.)

6 The Court has, as explained above, found that Defendants adequately represent Proposed  
7 Intervenors’ interests, and thus Proposed Intervenors cannot satisfy each of the requirements for  
8 intervention as of right, which is fatal to the request. *Perry*, 587 F.3d at 950. However, the Court  
9 does not believe that Proposed Intervenors’ ability to protect their interests would be practically  
10 impaired if they do not intervene.

#### 11 **4. Fourth Element: Timeliness**

12 The Court notes that the Motion to Intervene was filed less than one week after the  
13 initial complaint was filed and would thus be considered timely.

14 Based on the foregoing analysis (Section III.A.1–4), Proposed Intervenors’ Motion to  
15 Intervene as a matter of right is hereby **DENIED**.

#### 16 **B. PERMISSIVE INTERVENTION**

17 The Court considers three factors in determining whether to allow permissive intervention  
18 pursuant to Rule 24(b)(2): (1) the applicant’s claim or defense must share a common question of law  
19 or fact with the main action; (2) there must be independent grounds for jurisdiction over the claim or  
20 defense; and (3) timeliness. *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297,  
21 1308 (9th Cir. 1997); Fed. R. Civ. P. 24(b). Even where all the prerequisites are met, a district court  
22 has considerable discretion in ruling on the motion for permissive intervention. *In re Benny*, 791 F.2d  
23 712, 721–22 (9th Cir. 1986). “In exercising its discretion the court shall consider whether  
24 intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Fed.  
25 R. Civ. P. 24(b).

26 Based on their interest in “eliminating commercial shellfish production in Drakes Estero and  
27 its protection as wilderness,” Proposed Intervenors alternatively seek permissive intervention if the  
28 Court does not grant intervention as of right. (Mot. at 12–13.) As argued above, they assert their

1 “expertise in the science and policy regarding Drakes Estero and its resources could contribute to  
2 resolution of this case.” (*Id.* at 13.)

3 In response, Plaintiffs do not substantively dispute that Proposed Intervenors meet the  
4 requirements under Fed. R. Civ. P. 24(b). (*See Opp.* at 13 (“even if Applicants could meet Rule  
5 24(b)’s threshold . . .”).) Instead, Plaintiffs argue prejudice and request that the Court exercise its  
6 discretion and deny intervention. Plaintiffs contend that Proposed Intervenors will prolong litigation  
7 and inject “highly prejudicial speculation” into the litigation, as evidenced in the declarations  
8 submitted in support of the Motion that contain legal conclusions and argument “threaten[ing] to  
9 prejudice and derail the proceedings.” (*Opp.* at 12–14.)

10 The Court finds that while the Proposed Intervenors may have a unique point of view and  
11 expertise, intervention as a party will not necessarily facilitate resolution on the merits, but is likely to  
12 result in duplicative briefing adding a layer of unwarranted procedural complexity. For example,  
13 Proposed Intervenors filed a proposed opposition to the pending motion for preliminary injunction  
14 (“Proposed Intervenors’ Opposition”). (Dkt. No. 62.) The Court observes that Proposed Intervenors’  
15 Opposition very closely tracks Defendants’ arguments, adding few substantive arguments directly on  
16 point.<sup>6</sup> In light of the aligned interests and the duplication already shown, the Court finds that the  
17 benefits of proposed intervention are outweighed by the efficient resolution of the pending dispute.  
18 Moreover, the Court can permit briefing by the Proposed Intervenors on discrete issues of concern  
19 where their unique perspective would contribute productively to the discussion.

20 As set forth above, the Court **DECLINES TO GRANT** permissive intervention, but **GRANTS**  
21 Proposed Intervenors leave to request permission to file an amicus brief on specific issues in this  
22 litigation. Such requests for leave must identify the discrete topics that Proposed Intervenors seek to  
23 address and must be promptly made, such that the Court can adjust briefing schedules as necessary.

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25 <sup>6</sup> The Court notes that Plaintiffs have filed an Administrative Motion to Strike Proposed Intervenors’  
26 Opposition Brief, or, in the Alternative, for Leave to File Response. (Dkt. No. 83.) Plaintiffs argue that this  
27 opposition brief was unauthorized, as the Court had not yet ruled on the Motion to Intervene. In addition,  
28 Proposed Intervenors did not seek leave of Court for such filing. The Court agrees that Proposed Intervenors  
should have sought leave of court prior to filing their proposed opposition. However, in light of the Court’s  
review of the brief to assess Proposed Intervenors’ request to intervene, the Court **DECLINES** to strike Proposed  
Intervenors’ opposition and treats it as if it had been filed as an amicus brief. Accordingly, the Court **GRANTS**  
Plaintiffs’ request to file their reply thereto (Dkt. No. 83-1).

1 **IV. CONCLUSION**

2 For the reasons stated above, the Motion to Intervene is **DENIED**. This Order terminates Dkt.  
3 Nos. 11 & 83.

4 **IT IS SO ORDERED.**

5 Dated: February 4, 2013



6 **YVONNE GONZALEZ ROGERS**  
7 **UNITED STATES DISTRICT COURT JUDGE**

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