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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF INYO Plaintiff, v. DEPARTMENT OF THE INTERIOR, DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of the Interior, NATIONAL PARK SERVICE, MARY A. BOMAR, in her capacity as Director, National Park Service, JAMES T. REYNOLDS, in his capacity as Superintendent, Death Valley National Park, Defendants.	No. 1:06-CV-01502-AWI-DLB UNITED STATES' MEMORANDUM IN OPPOSITION TO MOTION OF SIERRA CLUB *ET AL*. FOR LEAVE TO INTERVENE AS DEFENDANTS DATE: April 30, 2007 TIME: 1:30 p.m. COURTROOM: #3 (5th Floor) Judge Anthony W. Ishii

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Defendants, Department of the Interior, Dirk Kempthorne, National Park Service, Mary A. Bomar, and James T. Reynolds (the "United States") hereby submit this Memorandum in Opposition to the Motion to Intervene as Defendants filed by Sierra Club, The Wilderness Society, California Wilderness Coalition, National Parks Conservation Association, Center for Biological Diversity, and Friends of the Inyo (the "Conservation Groups"), and the Memorandum in Support of Sierra Club *et al.*'s Motion to Intervene ("Memo.").

INTRODUCTION

Inyo County, California filed this lawsuit under the Quiet Title Act, 28 U.S.C. § 2409a, seeking to quiet title against the United States to four alleged R.S. 2477 right-of-ways within Death Valley National Park. The Conservation Groups seek to intervene as defendants pursuant to Fed. R. Civ. P. 24 with respect to three of the claimed rights-of-way. The Conservation Groups assert no ownership or title interest of their own in the property at issue to support their intervention as a matter of right in this property ownership dispute. Instead, the Conservation Groups maintain that their general interest and involvement in the management of Death Valley National Park Wilderness Area, in which three of the claimed rights-of-way are located, is sufficient for intervention as of right. The Conservation Groups also contend that they are entitled to permissive intervention.

LEGAL BACKGROUND

I. Rule 24 of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure provide that, upon timely application, an applicant may intervene as of right if applicant:

> [C]laims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). In addition, and again upon timely application, an entity

can be granted permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common," and intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b)(2).

II. The Quiet Title Act.

Under the doctrine of federal sovereign immunity, the United States is immune from suit except to the extent Congress expressly waives that immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Before the Quiet Title Act's enactment in 1972, the United States had not waived its immunity with respect to suits involving title to land. *Block v. North Dakota*, 461 U.S. 273, 280 (1983). As a result, those asserting title to land claimed by the United States had limited means of obtaining a resolution of the title dispute. *Id.* Those asserting title adverse to the United States could try to induce the United States to file a quiet title action against them or they could petition Congress or the Executive Branch for discretionary relief. *Id.* Those willing to settle for monetary compensation (instead of title to the disputed property) could sue and attempt to establish a constitutional claim for just compensation.[1]/ *Id.* at 280-81. Others tried to institute so-called "officer's suit[s]," proceeding against the federal official charged with supervision of the relevant land instead of the United States. *Id.* at 281. Such suits proved unsuccessful in circumventing federal sovereign immunity. *Id.* at 281-82.

Against that backdrop of limited remedies, Congress considered and enacted the Quiet Title Act. Congress sought to rectify the state of affairs where sovereign immunity prevented recourse to the courts by those asserting title to, or the right to

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[1]/ The just compensation route became available after the passage of the Tucker Act in 1887. *Block*, 461 U.S. at 280.

possession of, lands claimed by the United States. *Id.* at 282. The Quiet Title Act therefore provides that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). A plaintiff must "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." *Id.* § 2409a(d). The Quiet Title Act is the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." *Block*, 461 U.S. at 286. Where Quiet Title Act jurisdiction lies, the court can adjudicate title disputes between the plaintiff and the United States and render judgment as between them. *See Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993). The Quiet Title Act must be strictly construed in the government's favor because it is a limited waiver of federal sovereign immunity. *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *Block*, 461 U.S. at 287.

III. R.S. 2477.

In 1866, in the midst of an era of federal land-grant statutes aimed at facilitating the settlement of the American West, Congress passed R.S. 2477 as a means of providing public access across unreserved public domain lands. *See* Pamela Baldwin, HIGHWAY RIGHTS OF WAY: THE CONTROVERSY OVER CLAIMS UNDER R.S. 2477, at 10-18, Cong. Research Serv. (1993) (Attachment 1). From its enactment until its repeal in 1976, R.S. 2477 provided that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932 (repealed 1976). On October 21, 1976, Congress enacted the Federal Land Policy and Management Act which repealed R.S. 2477 but preserved "any valid" right-of-way "existing on the date of approval of this Act." Pub. L. No. 94-579, §§ 701(a), 706(a), 90 Stat. 2743, 2793 (1976).

As the Tenth Circuit recently explained, unlike other federal land statutes, "the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested. . . . R.S. 2477 was a standing offer of a free right of way over the public domain, and the grant may be accepted without formal action by public authorities." *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005) (internal quotation marks and citations omitted); *see also id.* at 753 ("Title to an R.S. 2477 right of way . . . passes without any procedural formalities and without any agency involvement."). R.S. 2477 rights-of-way remain subject to regulation by relevant federal land management agencies. *See id.* at 745-49; *see also Hale v. Norton*, 437 F.3d 892, 894 (9th Cir. 2005); *Clouser v. Epsy*, 42 F.3d 1522, 1538 (9th Cir. 1994); *Adams v. United States*, 3 F.3d 1254, 1258 n.1 (9th Cir. 1993); *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988); *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1238-41 (D. Utah 2000). The entity claiming an R.S. 2477 right-of-way against the federal government bears the burden of proving its right-of-way. *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d at 768-69.

SUMMARY OF ARGUMENT

In order to intervene as of right, an applicant must establish that it has a significantly protectable interest in the property or transaction that is the subject of the underlying litigation. Where the underlying lawsuit is one to quiet title, the applicant must claim an ownership or title interest in the property at issue. Here, the Conservation Groups assert only an interest in how Death Valley National Park is managed (an interest shared by any number of the National Park's users). The Conservation Groups do not claim any property interest in the land to which Inyo County seeks to quiet title. Because the court cannot quiet title to any interest in

the property to the Conservation Groups, their request for intervention as of right must be denied. The cases relied upon by the Conservation Groups to support their request for intervention as of right involve challenges to administrative action where courts apply a more flexible analysis for intervention. A Quiet Title Act lawsuit, however, is not a challenge to administrative action. Rather, it is an adjudication of a disputed title to real property – as between plaintiff and the United States. The case law upon which the Conservation Groups rely is therefore inapposite to the question of whether they are entitled to intervene in this quiet title action.

The Conservation Groups have also failed to demonstrate that resolution of this case without their intervention will impair or impede their ability to protect their asserted interest. The Conservation Groups' interest in how the land at issue will or will not be used is a question foreign to this action – the only question that will be resolved is who holds title to the disputed property. Even if title is quieted to Inyo County, the United States still has authority to manage the use of the rights-of-way – or to elect to retain the rights-of-way by paying just compensation.

Nor have the Conservation Groups carried their burden of rebutting the presumption that the United States will adequately represent the United States' interest in defending its title. The United States and the Conservation Groups share identical objectives – defeating Inyo County's quiet title action for claimed rights-of-way in Death Valley National Park – and therefore the United States is an adequate representative. The fact that the Conservation Groups' motivation for defending the County's claims may be different than that of the United States or that the Conservation Groups may intend to pursue different litigation strategies is not sufficient to rebut the presumption that the United States will adequately represent its interests in defending title. In asserting otherwise, the Conservation Groups rely on cases suggesting that the presumption of adequate representation

can be rebutted in cases in which the government is defending administrative actions where the public interest the government is obligated to represent differs from the proposed intervenor's more narrow and particular interest. Here, however, Inyo County does not challenge any administrative action; it seeks title to real property. In defending that lawsuit, the United States is not forced to choose between competing public interests; it simply defends its title. The Conservation Groups have no interest different than that of any citizen of the United States in the real property that is the subject of this action. The United States is presumed to adequately represent that interest and the Conservation Groups' contentions concerning land management issues do not rebut the presumption that the United States will fully and competently defend its title.

Finally, the Conservation Groups have failed to show that they are entitled to permissive intervention. The Conservation Groups fail to assert an independent basis for jurisdiction as to Inyo County's Quiet Title Act claims or as to any claim asserted by the Conservation Groups. In addition, the Conservation Groups fail to assert a claim or defense that has common questions of law or fact with the underlying action. Indeed, the interest asserted by the Conservation Groups – in the land management of the Death Valley National Park Wilderness Area – demonstrates that the Conservation Groups' participation would only inject issues that are irrelevant to the resolution of this property ownership dispute between Inyo County and the United States.

ARGUMENT

I. The Conservation Groups Do Not Meet The Requirements For Intervention As Of Right.

In order to entitled to intervene as of right under Rule 24(a)(2), applicant must meet all elements of the four-part test adopted in this Circuit:

> (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction that 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 the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 817-818 (9th Cir. 2001)*; DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1037 (9th Cir. 2006) (*quoting Southwest)*; *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996).

The United States does not dispute that the Conservation Groups' motion to intervene is timely. The Conservation Groups, however, fail to meet the remaining three requirements for intervention as of right.

A. In an action under the Quiet Title Act, only those persons claiming a property interest in the land at issue are proper parties.

1. An applicant for intervention must have a "significantly protectable interest" in the proceeding.

In order to intervene as of right, the Conservation Groups must establish that they "claim[] an interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2). The Supreme Court has explained that, when Rule 24(a) "speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action' . . . [w]hat is obviously meant there is a significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). As such, this Circuit has consistently held that the interest prong of

Rule 24(a)(2) is only met where the proposed intervenor has a "significantly protectable interest" relating to the property or transaction that is the subject of the underlying action. *DBSI/TRI IV Ltd.*, 465 F.3d at 1037; *Southwest Center for Biological Diversity*, 268 F.3d at 817-818; *Northwest Forest Resource Council*, 82 F.3d at 836.

An applicant for intervention has a "significantly protectable interest" in an action only if applicant can establish "'(1) that the interest [asserted] is protectable under some law, and (2) that there is a relationship between the legally protected interest and the claims at issue.'" *Forest Conservation Council v. U. S. Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995), (*quoting Sierra Club v. EPA* , 995 F.2d 1478, 1484 (9th Cir. 1993)). In addition, to meet the "significantly protectable interest" requirement, an applicant for intervention is required to establish that resolution of the action will have "direct, immediate, and harmful effects" upon the applicant's legally protectable interests. *Forest Conservation Council*, 66 F.3d at 1494.

These requirements bar intervention by applicants that merely have a concern about the litigation, but no legally protected interest at stake. For instance, in *Donaldson*, a circus worker attempted to intervene in a proceeding in which the Internal Revenue Service had sought to compel the worker's former employer to produce certain records concerning the worker's employment. *Id.* 400 U.S. at 518-19. The circus worker's self-evident interest in documents that related to his employment, and their potential impact on his tax liability, was not a "significantly protectable interest" because he had no legal interest at stake in the records themselves. *Id.* at 530. Intervention was therefore denied.

Similarly, in *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989), a trade association and several contractors were not allowed to intervene as to plaintiff's claim brought under the National Environmental Policy Act

("NEPA") because the proposed intervenors' economic interests were not sufficiently related to the interests intended to be protected by the statute at issue – NEPA. Likewise, in *Northwest Forest Resource Council*, 82 F.3d at 837-38, environmental groups were denied intervention because their interests in proper management and environmental protection of public forests and long-standing advocacy and activism in establishing environmental protections concerning logging on public lands were not deemed the necessary "significantly protectable interest" to warrant intervention.

In addition, when determining whether a claimed interest is a "significantly protectable interest" that is related to the claims at issue and whether resolution of the action will have "direct, immediate, and harmful effects" on that interest, it is important to consider the nature of the underlying litigation in which an applicant seeks to intervene. *See Northwest Forest Resource Council,* 82 F.3d at 837-38; *Sierra Club v. EPA*, 995 F.2d at 1482-83; *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of the Interior*, 100 F.3d 837, 840 (10th Cir. 1996); *Allard v. Frizzell*, 536 F.2d 1332, 1333-34 (10th Cir. 1976). The Conservation Groups' argue that "Under Ninth Circuit law, a 'public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.'" Memo. at 16, *quoting Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). The line of cases addressing intervention by public interest groups who were involved in enactment of challenged legislation provides no support for intervention by the Conservation Groups in this Quiet Title Act case. The Conservation Groups' attempt to analogize their situation to such cases ignores the nature of the underlying proceeding, the requirement of relationship between the asserted interest and the claims at issue, and the requirement of direct, immediate and harmful effect on the asserted interest.

The Conservation Groups' general interest in the Park Service's management of Death Valley National Park is not a "significantly protectable interest" related to the claims at issue – Inyo County's claimed ownership of rights-of-way under R.S. 2477. Resolution of Inyo County's Quiet Title Act suit will not have *any* direct, immediate or harmful effect on any legally protectable interest the Conservation Groups may have in the Park Service's management of Death Valley National Park. *See Forest Conservation Council*, 66 F.3d at 1494. This asserted interest in management and environmental protection cannot support intervention of right in a suit challenging the United States' title to the land.

2. Participation in a Quiet Title Act suit is limited to those who assert a claim to the property at issue.

Inyo County's lawsuit against the United States is founded upon the Quiet Title Act; it is a real property dispute between plaintiff and the United States. As is clear from the Quiet Title Act's text, which requires a plaintiff to specify the nature of the right, title, or interest it claims as well as that claimed by the United States, the purpose of such a lawsuit is limited to "determin[ing] which named party has superior claim to a certain piece of property." *Cadorette*, 988 F.2d at 223 (citing *Nevada v. United States*, 463 U.S. 110, 143-44 (1983)). That is, a Quiet Title Act lawsuit adjudicates conflicting claims to ownership of real property; a third party without an ownership claim in the disputed property has no place in such an action. *See* 28 U.S.C. § 2409a(d); *cf.* Nov. 2001 Report of the Special Master at 14, *Alaska v. United States*, 534 U.S. 1103 (2002) (order denying intervention) (Attachment 2).

The Conservation Groups argue that they need not assert interests protectable under the Quiet Title Act to be entitled to intervention here, asserting that the Ninth Circuit has allowed intervention by conservation groups in a previous Quiet Title Act case involving R.S. 2477 claims to a road on Forest Service Land. Memo. at 17 n. 6, (*citing United States v. Carpenter*, 298 F.3d

1122, 1124-25 (9th Cir. 2002); *Park County v. United States*, 626 F.2d 718, 719 (9th Cir. 1980); *Southwest Four Wheel Drive Ass'n v. BLM*, 363 F.3d 1069 (10th Cir. 2004); *City & County of Denver v. Bergland*, 517 F. Supp. 155 (D. Colo. 1981), *aff'd in part, rev'd in part* 695 F.2d 465 (10th Cir. 1982)). But none of the cases cited by the Conservation Groups contains any analysis relevant to this Court's determination of whether the Conservation Groups' asserted interest in land management is sufficient for intervention as of right in this Quiet Title Act case. In *Carpenter*, the Ninth Circuit addressed only the question of whether environmental groups timely sought to intervene to object to a proposed settlement agreement; the court did not address the interest necessary to intervene as of right in a Quiet Title Act lawsuit. *Park County, Southwest Four Wheel Drive Ass'n*, and *City & County of Denver* noted in passing (or in the caption) that an entity was allowed to intervene, with no analysis of whether that intervention was proper (*i.e.*, the propriety of intervention does not seem to have been raised by any party).[2]/ Simply put, the cases noted by the Conservation Groups do not address the extensive arguments set forth above as to why the Conservation Groups do not have a "significantly protectable interest" that can support intervention as of right in this Quiet Title Act property dispute between Inyo County and the United States.

No one can assert a Quiet Title Act claim as a plaintiff or a defendant who "does not claim a property interest to which title may be quieted." *Long v. Area Manager*, 236 F.3d 910, 915 (8th Cir. 2001); *but see San Juan County v. United States*, 420 F.3d 1197 (10th Cir. 2005), *reh'g en banc pending*. Courts have long been clear that the legally protected interest in property that is relevant to a Quiet Title Act lawsuit is dependent upon a claim to the land itself. *See Southwest Four*

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[2]/ The district court decision in *City & County of Denver* does include a sentence that seems to relate to the interest requirement for intervention as of right, 517 F. Supp. at 178, but it addresses none of the arguments set forth in this brief.

Wheel Drive Ass'n, 363 F.3d at 1071; *Kansas v. United States*, 249 F.3d 1213, 1225 (10th Cir. 2001); *Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978); *cf.* Nov. 2001 Report of the Special Master at 14, *Alaska v. United States* (Attachment 2). The Conservation Groups do not (and cannot) assert such an interest in the property at issue in Inyo County's Quiet Title Act lawsuit.

As discussed above, this Circuit has also long recognized that the nature of the underlying litigation impacts the analysis of whether an intervention applicant has a "significantly protectable interest" sufficient for intervention. *Sierra Club* differentiated between interests protectable by traditional legal doctrines (such as ownership rights in real property) and lawsuits challenging statutory enactments or administrative proceedings. *Sierra Club*, 995 F.2d at 1482-83. That distinction finds basis in the text of the intervention rule, which differentiates between intervention where the subject of the underlying action is "property" and where the subject of the underlying action is a "transaction."

In order to meet the "significantly protectable interest" requirement in "traditional" actions (*i.e.*, suits not involving challenges to administrative action), such as lawsuits that affect the use or ownership of real property, proposed intervenors have been required to show a direct interest in the property at issue. In *Sierra Club*, for example, the City of Phoenix was allowed to intervene in a suit to require the EPA to change the terms of wastewater discharge permits issued to the City. *Sierra Club*, 995 F.2d at 1480-83. The Court, contrasting the case to those where proposed intervenors sought to intervene in actions challenging statutory enactments or administrative proceedings, noted that the City of Phoenix owned the wastewater treatment plants and the discharge permits that would be affected by the proceeding against EPA. *Id.* at 1482-83. The Court observed that the City's interests "are rights connected with the City's ownership of real property and its status as an EPA permittee," and that the lawsuit "would affect the use of real

property owned by the intervenor by requiring the defendant to change the terms of permits it issues to the would-be intervenor, which permits regulate the use of that real property." *Id*. The Court concluded that the City's interests were "squarely within the class of interests traditionally protected by law." *Id*. *Cf.* Nov. 2001 Report of the Special Master at 14, *Alaska v. United States* (Attachment 2). (Two native Alaskan Nations denied intervention in original action brought by State of Alaska under Quiet Title Act where proposed intervenors did not claim to own land but, rather, sought to intervene in support of United States' claim to the property.)

In sum, in lawsuits concerning ownership interests in real property (as opposed to lawsuits challenging administrative action) the operative term in Rule 24(a)(2) is "property," and this Circuit requires that a would-be-intervenor demonstrate a "significantly protectable interest" by asserting an ownership or title interest in the property that is in dispute and that resolution of the lawsuit threatens to diminish that property interest. A Quiet Title Act action against the United States is a lawsuit concerning interests in real property – it is the sole means for adjudication of a disputed title to real property in which the United States claims an interest. In a Quiet Title Act lawsuit, the United States is sued as an entity claiming an interest in real property (much like a private individual), not as a regulator (as it is in lawsuits challenging administrative action). A Quiet Title Act action simply is not a lawsuit challenging administrative action.[3]/ Inyo County's Quiet Title Act lawsuit is a traditional suit where the operative word in Rule 24(a)(2) is "property," not "transaction." This Circuit's analysis for intervention in

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[3]/ That is particularly true in the context of a claimed R.S. 2477 right-of-way. An R.S. 2477 right-of-way is acquired with no formal action by public authorities, *i.e.*, without any administrative action. *See Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d at 741, 753.

lawsuits concerning interests in real property therefore applies where an applicant seeks to intervene as of right in a Quiet Title Act lawsuit. In other words, the only proper parties to a Quiet Title Act lawsuit are those claiming an ownership or title interest in the land under dispute.

The importance of considering the nature of the underlying litigation is further highlighted by *Sierra Club's* discussion of the requirement of relationship between the legally protectable interest and the claims at issue. *See Sierra Club*, 995 F.2d at 1483-84. The Court explained that, while the legal interest need not be protectable under the statute under which the lawsuit is brought, the interest must be protected under some law and there must be "a relationship between the legally protected interest and the claims at issue." *Sierra Club*, 995 F.2d at 1484. *See also Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (requiring "'relationship between the legally protected interest and the claims at issue'" (quoting *Sierra Club*, 995 F.2d at 1484)); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995) ("In ascertaining a potential intervenor's interest in a case, our cases focus on the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues.").

Here, the Conservation Groups can show no relationship between their asserted interest in the management of Death Valley National Park and Inyo County's R.S. 2477 claims. The Conservation Groups' claimed interest is in the ecological, biological, scientific, historic, and aesthetic values of Death Valley National Park. *See* Memo. at 18. The Conservation Groups assert that a number of land management and environmental statutes protect those interests. *See id*. at 18-19 (*citing*: California Desert Protection Act, Pub. L. No. 103-433, § 2(b), 108 Stat. 4471; Wilderness Act, 16 U.S.C. § 1133(c); National Park Service Organic Act, 16 U.S.C. § 1; National Historic Preservation Act, 16 U.S.C. § 470h-2(a)(2)(B); and the Endangered Species Act, 16 U.S.C. § 1536(a)(2)). However, the Conservation

Groups identify no provision in the cited statutes that give its members the right to use the property for those activities. That the Conservation Groups might fall within those statutes' zones of interest such that they could bring an Administrative Procedure Act lawsuit, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 883 (1990), says nothing about whether the Conservation Groups have the necessary "significantly protectable interest" for intervention in this Quiet Title Act lawsuit.

The Conservation Groups' argument erroneously divorces the interest required for intervention from the nature of the underlying litigation. Even if a would-be intervenor's claimed interest need not be *protected* by the statute that forms the basis of the plaintiff's complaint (the Quiet Title Act and R.S. 2477 in this case), the interest still must be relevant to the underlying litigation and the claims. Here, the Conservation Groups' claimed interest is clearly insufficient. The legal interests relevant to Quiet Title Act lawsuits are claims to ownership of the property in which title can be quieted. The Conservation Groups do not claim such an interest, and they should be denied intervention.

3. The Conservation Groups do not have a "significantly protectable interest" because they do not claim an ownership interest in the lands at issue in Inyo County's Quiet Title Act claim.

Applying those principles to the instant case compels the conclusion that the Conservation Groups lack the "significantly protectable interest" necessary to intervene in this Quiet Title Act suit. As discussed above, the Conservation Groups must claim an ownership or title interest in the property at issue to establish the necessary legally protectable interest for intervention as of right in this quiet title action. The Conservation Groups failed to include any such claim to the property at issue in this Quiet Title Act suit. The Conservation Groups assert interests in the ecological, biological, scientific, historic and aesthetic values of the areas in which Inyo County's claimed rights-of-way lie, *see* Memo. at 18; that is, the Conservation Groups assert an interest in how the land is managed. The

Conservation Groups claim no interest in the title or ownership of the portions of Death Valley National Park in which Inyo County asserts it has title to R.S. 2477 rights-of-way. Thus, just as the circus worker in *Donaldson* could not intervene (despite his clear personal interest in preventing the disclosure of his former employer's records) because he had no legal interest in the records, the Conservation Groups cannot intervene in this litigation because they have no legal interest in the portions of Death Valley National Park claimed by Inyo County. Indeed, the court cannot quiet title in the property to the Conservation Groups.

Not only is the Conservation Groups' alleged land-management interest not the legally protectable interest in property necessary for intervention in a Quiet Title Act lawsuit; it will not be directly, immediately, and harmfully affected by resolution of this Quiet Title Act suit. *See Forest Conservation Council*, 66 F.3d at 1494. The Conservation Groups claim that, if title is quieted in favor of Inyo County, the alleged rights-of-way will be used contrary to the Conservation Groups' environmental interest, while title quieted in the United States would benefit the Conservation Groups' asserted interest. Memo. at 20-22. The Conservation Groups' claimed interest is indirect and contingent.

First and foremost, how the land at issue will or will not be used is a question foreign to this action – the only question that will be resolved is who holds title to the right-of-way. Second, the Conservation Groups' argument ignores the fact that even if title is quieted to Inyo County, the United States still has authority to manage the use of the right-of-way. *See Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d at 745-49; *Hale v. Norton*, 437 F.3d at 894; *Clouser v. Epsy*, 42 F.3d at 1538; *Adams v. United States*, 3 F.3d at 1258 n.1; *United States v. Vogler*, 859 F.2d at 642; *United States v. Garfield County*, 122 F. Supp. 2d at 1238-41. Third, even if the court's final determination of the quiet title action is adverse to the United States, the United States can still elect to retain the

right-of-way by paying just compensation. 28 U.S.C. § 2409a(b). In short, the Conservation Groups' belief that their land management interest will be better served if the United States is determined to be the title holder falls far short of the showing of "direct, immediate, and harmful effects" on legally protectable interests required by *Forest Conservation Council* and *Sierra Club*. *See Forest Conservation Council*, 66 F.2d at 1494; *Sierra Club*, 992 F.2d at 1482-83; *cf.* Nov. 2001 Report of the Special Master at 14, *Alaska v. United States* (Attachment 2). ("True, the Proposed Intervenors have a specific reason for wanting the United States to have title. In particular, a determination that the land belongs to the United States might allow them to assert rights under [the Alaska National Interest Land Conservation Act] in another forum. In the past, however, the [Supreme] Court has not considered derivative interests of this kind sufficient to permit intervention.")

Finally, the Conservation Groups' intervention theory is inconsistent with the Quiet Title Act's limited waiver of the federal sovereign immunity and the notion that the intervention "interest" analysis is informed by the twin goals of efficiency and access to the courts. *See Greene v. United States*, 996 F.2d, 973, 978 (9th Cir. 1993). There is no indication that Congress intended the participants in a Quiet Title Act lawsuit to be anything more than competing claimants to title in real property. There may well be any number of groups with varying interests in how federal property is managed, all of whom may, under the Conservation Groups' theory, choose to intervene as a matter of right (as plaintiffs or defendants, depending on their management interest) in a Quiet Title Act lawsuit. That would greatly disrupt the orderly and efficient disposition of Quiet Title Act lawsuits and be inconsistent with the Quiet Title Act's limited sovereign immunity waiver. Inviting unwieldy, multiparty Quiet Title Act lawsuits would divert attention from the title question (the only question) before the court and be inconsistent with the

Quiet Title Act's limited sovereign immunity waiver. Moreover, allowing intervention by user groups as plaintiffs would impermissibly expand the Quiet Title Act's sovereign immunity waiver by allowing an entity to assert a claim against the United States without meeting the Act's conditions. *See* 28 U.S.C. § 2409a(d).

The Conservation Groups' approach also ignores the practical difficulties with granting party status in Quiet Title Act lawsuits to entities claiming no title interest in the disputed property. The judgment here will quiet title in one of the parties. But an entity who claims no title interest cannot obtain such a judgment. The Conservation Groups cannot claim land on behalf of the United States and assert that title adverse to Inyo County. *Carlson v. United States*, 556 F.2d 489, 493 (Ct. Cl. 1977); *cf. Wight v. Dubois*, 21 F. 693, 693-94 (C.C.D. Colo. 1884) ("[W]hen grantor and grantee are satisfied, a stranger has nothing to say."). That, however, is exactly what the Conservation Groups would be doing if allowed to intervene. Those with interests in the management of federal land are free to participate, as appropriate, in litigation over management questions. Absent a title claim in the property at issue in a Quiet Title Act lawsuit, however, entities with solely a management interest have no place as a party in a Quiet Title Act suit.[4]/

In sum, the court should deny the Conservation Groups' motion for intervention as of right because the Conservation Groups' indirect and contingent interest in the management of Death Valley National Park falls well short of the "significantly protectable interest" in the property at issue required for intervention here.

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[4]/ Assuming an entity meets the requirements for *amicus curiae* status, it may elect to file an amicus brief.

B. Resolution of this title dispute will not impair or impede the Conservation Groups' ability to protect their asserted interest.

To establish its entitlement to intervention as of right, the Conservation Groups must also show that disposition of this case will impair or impede their ability to protect their asserted interest in the management of the land at issue. *See* Fed. R. Civ. P. 24 (a)(2). Because the Conservation Groups cannot establish a sufficient interest for intervention as of right, they cannot establish that their ability to protect a relevant interest will be impaired or impeded by resolution of this lawsuit. Moreover, even if the Conservation Groups' land management interest satisfied the required interest for intervention as of right, the Conservation Groups do not and cannot meet their burden of establishing that their ability to protect that interest would be impaired or impeded by resolution of this quiet title lawsuit.

The disposition of this quiet title action will not impair or impede the Conservation Groups' ability to protect their interest in the management of Death Valley National Park because those management interests are not at issue in this case. Resolution of this lawsuit will determine only whether the County owns the four claimed R.S. 2477 rights-of-way in Death Valley National Park. The Conservation Groups nonetheless contend that their ability to protect their interest in management of the Park will be impaired and impeded by this quiet title action because: "The relief Inyo County seeks will degrade habitat, destroy wilderness character, and undermine the natural, cultural, and wildlife values and solitude within the National Park that [the] Conservation Groups exist to protect." Memo. at 1.[5]/ The Conservation Groups assert that: "The Ninth Circuit and others have

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[5]/ The Conservation Groups note that the relief requested by the County's complaint includes a request for relief beyond quieting title in the claimed roads, such as an order requiring the United States to remove obstructions placed by the United States on the claimed routes. *See* Memo. at 19, citing Complaint, Request for Relief ¶¶ 2-4. The Quiet Title Act, however, does not provide a waiver of

long permitted conservation groups to intervene where the litigation may result in harm to natural and other resource values that are important to the groups' missions and where the groups have worked to protect those values." Memo. at 22, *citing Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995). Again, the Conservation Groups cite to inapposite authority concerning administrative action and ignore the nature of the underlying action and the requirement of direct, immediate and harmful effects on the asserted interest. Here, even if it is eventually determined that Inyo County has the claimed R.S. 2477 rights-of-way, the United States (more specifically, the National Park Service) would still retain the authority to regulate and manage activities within the national park. That is, the Park Service could still regulate the use of an R.S. 2477 right-of-way over lands in the Death Valley National Park in order to meet its statutory responsibilities. *See Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d at 745-49; *Hale v. Norton*, 437 F.3d at 894; *Clouser v. Epsy*, 42 F.3d at 1538; *Adams v. United States*, 3 F.3d at 1258 n.1; *United States v. Vogler*, 859 F.2d at 642; *United States v. Garfield County*, 122 F. Supp. 2d at 1238-41.

The Conservation Groups acknowledge the Park Service's authority to regulate the use of an R.S. 2477 right-of-way, *see* Memo. at 22 n.7, but stress that the *full range* of management options may no longer be available to the United States if Inyo County succeeds in having title quieted in its favor. It nonetheless remains the case that a decision regarding the existence of an R.S. 2477 right-of-way will not be determinative of how the right-of-way is managed.[6]/ Indeed, two

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sovereign immunity with respect to such requested relief and that relief is therefore not available.

[6]/ The inclusion of three of the claimed rights-of-way ("Petro Road," "Lost Section Road-South," and "Last Chance Road;" but not "Padre Point Road")

of the proposed intervenors (the Sierra Club and The Wilderness Society) have argued elsewhere that "[t]he Tenth Circuit . . . has stated repeatedly that the federal government does retain the authority to regulate R.S. 2477 rights-of-way," and that "[t]he Ninth Circuit has held that *even if* the routes were valid rights-of-way, the Forest Service had authority to bar motorized vehicle use on alleged R.S. 2477 route." *Kane County v. Kempthorne*, D. Utah, No. 2:05-cv-941, Docket Entry No. 39 at 7 (Attachment 3) & Docket Entry No. 46 at 1 (Attachment 4) (emphasis in original). The decisions as to how to manage the rights-of-way (in the event any of them are recognized) will be made another day, in another forum; they will not be made in this quiet title suit. Those decisions will be made in accordance with applicable law and public notice and comment requirements. To the extent the Conservation Groups are dissatisfied with any management decisions, with the proper legal interest, they may bring an action challenging those decisions. The Conservation Groups' brief demonstrates well their ability to utilize public participation processes as well as litigation to challenge final agency action. *See* Memo. at 5-8. Moreover, the mere fact that *all* possible management options may not be available to the United States if an R.S. 2477 right-of-way is recognized is insufficient to establish that the Conservation Groups' ability to protect their interest in the management of Death Valley National Park would be sufficiently impaired and impeded by a disposition of this lawsuit such that they must be allowed to intervene as of right.

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within the Death Valley National Park Wilderness Area may preclude establishment of any roads or use by mechanical transport – even if one or more of the claimed R.S. 2477 rights-of-way are recognized. *See* 16 U.S.C. § 1131(c), 1133(b) & (c).

In sum, the underlying action here will only adjudicate Inyo County's claimed R.S. 2477 rights-of-way in Death Valley National Park. That is a question of property ownership in which the Conservation Groups have no significantly protectable interest and the resolution of which will not impair or impede the Conservation Groups' pursuit of their land management interests.

C. The United States adequately represents the Conservation Groups' asserted interest.

Even if the Conservation Groups could establish the significantly protectable interest in the property at issue, they have failed to establish that their interest is not adequately represented by the existing parties to the litigation. The Conservation Groups argue that the United States is not an adequate representative because the United States must represent the general public interest while the Conservation Groups have a narrower and more focused interest in "protection and preservation" of Park resources. Memo. at 25-26. The Conservation Groups' assertion is based on inapplicable case law.

As an initial matter, where an applicant seeks to intervene on the side of the government, courts generally require that the applicant make a heightened showing of inadequate representation because the government is an adequate representative of all its citizens. *See, e.g., Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006) (Because defendant is the Oregon government, "it is assumed that defendant is adequately representing intervenor-defendants' interests."); *Little Rock Sch. Dist v. N. Little Rock Sch. Dist.*, 378 F.3d 775, 780 (8th Cir. 2004) ("A party generally need only make a minimal showing that representation may be inadequate to be entitled to intervene on that basis, but the burden is greater if the named party is a government entity that represents interests common to the public. We presume that the government entity adequately represents the public, and we require the party seeking to intervene to make a strong showing of inadequate representation . . . ." (Internal quotation marks and citations omitted)); *Arakaki v. Cayetano*, 324

F.3d 1078, 1086 (9th Cir. 2003) ("There is [] an assumption of adequacy when the government is acting on behalf of a constituency that it represents."); *Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996); *Forest Conservation Council*, 66 F.3d at 1499 ("[A] presumption of adequate representation generally arises when the representative is a governmental body . . . charged by law with representing the interests of the absentee."); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 984-85 (2d Cir. 1984); *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976) ("[P]resumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee."). In addition, this Circuit has held that, where the proposed intervenor has the same ultimate objective as the government, the government will be presumed to represent its citizens' interests in the absence of a "very compelling showing to the contrary:"

> The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation.
>
> There is also an assumption of adequacy when the government and the applicant are on the same side. 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. Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.

Arakaki, 324 F.3d at 1086 (internal quotation marks and citations omitted). *See also Prete v. Bradbury*, 438 F.3d at 957 (Where the "ultimate objective" of defendant and intervenor-defendants is the same, "a presumption arises that defendant is adequately representing intervenor-defendants' interests."); *League of*

United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1305 (9th Cir. 1997) ("Under well settled precedent in this circuit, where an applicant for intervention and an existing party have the same *ultimate objective*, a presumption of adequacy of representation arises." (Emphasis in original; internal quotes and citations omitted)); *Southwest Center. for Biological Diversity*, 268 F.3d at 823 ("We have held that where an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." (Internal quotes and citations omitted); *Northwest Forest Resource Council*, 82 F.3d at 838 ("Where an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." (Internal quotes and citation omitted)); *City of Stilwell v. Ozarks Rural Elec. Coop.*, 79 F.3d 1038, 1042 (10th Cir. 1996) (Even where a party's motivation for pursuing or defending a claim differs from that of a would-be intervenor, "representation is adequate when the objective of the applicant for intervention is identical to that of one of the parties." (Internal quotes and citations omitted.)).

Here the United States and the Conservation Groups share the same ultimate objective – defeating Inyo County's claim to R.S. 2477 rights-of-way within Death Valley National Park – and therefore the United States is an adequate representative. In contending otherwise, the Conservation Groups rely on cases in which this Circuit has suggested that the presumption of adequate representation can be rebutted where the public interest the government is obligated to represent differs from the proposed intervenor's particular interest. Memo. at 23-26, *citing Southwest Center for Biological Diversity v. Berg*, 268 F.3d at 823; *Yniguez v. State of Arizona*, 939 F.2d 727, 738 (9th Cir. 1991), *vacated on other grounds by, Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988); *Forest Conservation Council*, 66 F.3d at 1499; *Johnson v. S.F. Unified Sch. Dist.*, 500 F.2d 349, 354 (9th Cir. 1974);

Prete v. Bradbury, 438 F.3d at 956; *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). But those cases are readily distinguishable. The cited cases fall into two categories: (1) cases in which the plaintiff was challenging, and the government was defending, administrative action, and (2) cases in which states were defending ballot initiatives amending state constitutions[7]/ or the government was seeking to protect constitutional rights of protected classes of persons.[8]/ In the

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[7]/ In *Yniguez*, "Arizonans for Official English," as the principal sponsor of a ballot initiative amending the state constitution by adopting "English as the Official Language," was allowed to intervene after the initiative was determined to be unconstitutional and the only defendant, the Governor of Arizona, chose not to appeal. *Yniguez v. State of Arizona*, 939 F.2d at 7309. However, the Supreme Court subsequently vacated the Circuit's decision on the grounds that plaintiff Yniguez's resignation from her employment with the state, after the district court judgment but before appeal mooted the case. *See Arizonans for Official English v. Arizona*, 520 U.S. at 72.

In *Prete v. Bradbury*, the sponsors of a ballot initiative amending the state constitution by prohibiting payment of electoral petition signature gatherers on a per-signature basis were deemed to have been erroneously allowed to intervene. *See Prete v. Bradbury*, 438 F.3d at 959. The Circuit determined, because the proposed intervenors and defendant Bradbury, in his official capacity as the Secretary of State of Oregon, sought the same ultimate objective, a presumption of adequacy of representation arose. *See id*. at 957. The Court further determined that a second presumption or circumstance favoring the assumption of adequacy of representation arises where the existing party sharing the same objective is the government. *See id*. The Circuit concluded that the proposed intervenors failed to make the necessary "compelling showing" of inadequacy of representation by the State. *Id*. at 957-59.

[8]/ In *United States v. Oregon*, the United States was enforcing federal legislation (the Civil Rights of Institutionalized Persons Act) designed to protect the constitutional rights of mentally retarded persons. *See United States v. Oregon*, 839 F.2d at 636. The Ninth Circuit reversed the district court's denial of intervention by residents of the state mental institution that was the subject of the suit. *See id.* at 638-39. However, the district court's denial was "based not so much on adequacy of representation as it was on" the district court's view that the

three cited cases involving challenges to administrative action, the Ninth Circuit concluded that the government might not adequately represent the narrow and particular interest of an intervenor because of its obligations to the general public or duty to balance a variety of interests created by multiple statutory objectives. *See Forest Conservation Council*, 66 F.3d at 1499 ("The Forest Service is required to represent a broader view than the more narrow, parochial interests of the State of Arizona and Apache County."); *Southwest Center for Biological Diversity*, 268 F.3d at 823 (The City of San Diego's "range of considerations in development is broader than the profit-motives animating developers."); *Sagebrush Rebellion*, 713 F.2d at 528 (National Audobon Society and associated environmental intervenors deemed to have a "perspective which differs materially" from Secretary of the Interior James Watt, who was previously head of the Mountain States Legal Foundation, the organization which was representing the plaintiff Sagegbrush Rebellion and gave rise to the sobriquet for the case as "*Watt v. Watt*."). *See also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (citing

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litigation would not impair the ability of the intervenors to proceed with a different suit to protect their interests. *Id*. at 638. The Circuit reversed based on its determination that those interests would be impaired and did not address the adequacy of representation element. *See id.* at 638-39.

In *Johnson v. S.F. Unified Sch. Dist.*, the San Francisco Unified School District was seeking approval of a school desegregation plan designed to balance the assignments of minority students among the District's schools. *Johnson*, 500 F.2d at 350. The Ninth Circuit reversed the district court's denial of a motion to intervene filed by the parents of children of Chinese ancestry who opposed compulsory reassignment of such students to schools outside of their community schools that did not offer education in Chinese language, art, culture and history. *See id*. at 352. In reversing, the Circuit disagreed with the district court's conclusion "that the school district, which is charged with the representation of all parents within the district and which authored the very plan which appellants claim impairs their interest, adequately represents appellants." *Id*. at 354.

and quoting *Mausolf*, 85 F.3d at 1302-04); *Mausolf*, 85 F.3d at 1303 ("When managing and regulating public lands, to avoid what economists call the 'tragedy of the commons,' the Government must inevitably favor certain uses over others. [Voyageurs Nat'l Park] was established for both recreational and conservationist purposes. These purposes will sometimes, unavoidably, conflict, and even the Government cannot always adequately represent conflicting interests at the same time.").

In this case, however, Inyo County does not challenge any administrative action; it seeks to quiet title in real property. In defending against Inyo's lawsuit, the United States is not forced to choose between competing public interests; it simply defends its title. Even assuming the United States has different management objectives from the Conservation Groups, the government is not called on here to defend management choices and the Conservation Groups have provided no basis for concluding that different management objectives would prevent the United States from vigorously defending its title. Thus, the cases the Conservation Groups have relied on do not apply here.[9]/

The Conservation Groups' argument that the United States is not an adequate representative because the Conservation Groups' interest is narrowly focused on "protection and preservation of the Death Valley's wildlands and wildlife and the elimination of vehicle use within Death Valley National Park's wilderness," Memo. at 25, besides being based on inapplicable case law, is factually irrelevant. Information or argument regarding management of the area affected by the claimed rights-of-way provides nothing relevant to determining who has title in this quiet title suit. Similarly without merit is the Conservation

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[9]/ Again, the fact that it is R.S. 2477 rights-of-way to which Inyo County seeks to quiet title reinforces the point that the United States is not defending administrative action here. *Supra* note 3.

Groups' assertion that the United States is not an adequate representative because it might not advance the argument that mechanical construction is required to perfect a R.S. 2477 right-of-way. *See* Memo. at 23-24. As noted above, this Circuit has held that "[w]here parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Arakaki*, 324 F.3d at 1086. *See also Northwest Forest Resource Council*, 82 F.3d at 838. (Differences in litigation strategy and interpretation of various environmental statutes insufficient to rebut presumption of adequate representation where proposed intervenor environmental group and government "have the same ultimate objective."). The United States and the Conservation Groups share the objective of defeating Inyo County's R.S. 2477 claims and the fact that the Conservation Groups can conjure arguments that the United States might not present does not make the necessary "compelling showing" of inadequate representation. *See Arakaki*, 324 F.3d at 1086 .

In short, the court should deny the Conservation Groups' motion to intervene as of right because the United States is an adequate representative in this Quiet Title Act lawsuit.

II. The Conservation Groups Do Not Meet The Requirements For Permissive Intervention.

The Ninth Circuit has made it clear that a court may grant permissive intervention pursuant to Rule 24((b)(2) only where applicant can establish all three of the following prerequisites:

> (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.

League of United Latin Am. Citizens, 131 F.3d at 1308, *quoting Northwest Forest Resource*, 82 F.3d at 839. *See also Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998); *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993).

Again, the United States does not dispute that the Conservation Groups' motion to intervene is timely. The Conservation Groups, however, fail to meet the remaining two requirements for permissive intervention.

A. The Conservation Groups fail to allege an independent basis for jurisdiction.

In order to meet the independent grounds for jurisdiction requirement, the proposed intervenor must show federal subject matter jurisdiction both for "permissive intervention in the first instance," and for any "newly raised causes of action." *Blake v. Pallan*, 554 F.2d 947, 956 (9th Cir. 1977); *United States v. Lindstedt*, 1995 WL 774520 at *9 (D. Or. Dec. 4, 1995) (Attachment 5) ("The putative intervenor must show federal subject matter jurisdiction for permissive intervention in the first instance, and for any newly raised claims or causes of action.") (*citing Blake*, 554 F.2d at 956); *City of Eugene v. IGI Resources, Inc.*, 2004 WL 1774556 at *2 (D. Or. Aug. 5, 2004) (Attachment 6) ("The requirement of an independent jurisdictional ground applies to the proposed permissive intervention in the first instance, and to causes of action asserted by the applicant.") (*citing Blake*, 554 F.2d at 956).

These cases make it clear that the requirement of showing independent grounds for federal matter jurisdiction for "permissive intervention in the first instance" mandates that the proposed intervenor establish that its interests are such that it could prosecute or defend against the underlying claim.[10]/ In *Blake*, the court determined that the Commissioner of Corporations of the State of California had no independent grounds of jurisdiction for intervention as to two causes of action brought by the investor-plaintiffs under the federal securities statutes

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[10]/ It is an unsettled question whether a proposed intervenor must independently establish Article III standing to intervene as of *right*. There is a circuit split on this issue that the Supreme Court has yet to settle. *See Prete v. Bradbury*, 438 F.3d at 955 n.8.

because the Commissioner was neither a purchaser or seller of the alleged securities involved. *See Blake*, 554 F.2d at 956. However, the Commissioner was allowed to permissively intervene as to two other causes of action that were based upon state securities laws that the Commissioner was empowered to enforce. *See id*. Once permitted to intervene, however, the Commissioner filed a complaint-in-intervention in which he did not join in the two causes of action he had authority to enforce and, instead, raised three new state securities law claims. *See id*. at 956-57. The Circuit affirmed the district court's dismissal of the Commissioner's complaint-in-intervention on the basis that the Commissioner failed to show independent grounds for jurisdiction. *See id*. at 956-58.

Lindstedt involved a proposed intervenor who claimed an interest in a tax lawsuit brought by the United States against Lindstedt as the personal representative of the Estate of Kettleberg. *See Lindstedt*, 1995 WL 774520 at *1 (Attachment 5). The proposed intervenor, Kent, as the sole residuary beneficiary of the Estate, asserted an interest in increasing her inheritance by assisting the United States in recovering assets that Kent alleged belonged to the Estate and would result in an additional $5 million in taxes. *See id*. at *1, *3. The Court determined that Kent could not establish independent grounds for jurisdiction for permissive intervention in the first instance, *i.e.*, as to the underlying claim, because she was not the taxpayer involved in the dispute. *See id*. at *9. The Court noted "A tax dispute is between the taxpayer and the United States alone, even if a third person is directly affected by the eventual outcome." *Id*. (*citing United States v. Formige*, 659 F.2d 206, 208 (D.C. Cir. 1981)). The Court concluded that because "Kent cannot assert the United States' claim against Lindstedt," she failed to show independent grounds for jurisdiction and did not meet that requirement for permissive intervention. *Lindstedt* at *9. *See also City of Eugene*, 2004 WL 1774556 at *1-2 (Attachment 6) (Proposed intervenor, Weyerhaeuser Company,

denied permissive intervention in suit brought by City of Eugene against IGI Resources to collect outstanding tax bill where IGI had billed Weyerhaeuser for the amount of the outstanding tax because Wayerhaeuser did not allege it was directly liable to the City for the tax and therefore failed to establish independent grounds for jurisdiction.).

Here, the Conservation Groups cannot show independent grounds for jurisdiction concerning permissive intervention in the first instance, *i.e.*, as to the underlying Quiet Title Act claims of Inyo County against the United States, *or* as to any newly raised claims or causes of action. Like the proposed intervenors in *Blake*, *Lindstedt*, and *City of Eugene*, the Conservation Groups have no independent grounds for jurisdiction as to the underlying action because the Conservation Groups claim no ownership interest in the property at dispute and therefore have no basis for suit pursuant to the Quiet Title Act. *See* Nov. 2001 Report of the Special Master at 14, *Alaska v. United States* (Attachment 2 at 14); *Southwest Four Wheel Drive Ass'n*, 363 F.3d at 1071. The Conservation Groups' interest in joining in the United States' defenses against Inyo County does not satisfy the requirement of showing an independent basis for jurisdiction. *See Blake*, 554 F.2d at 956, *Lindstedt*, at *9 (Attachment 5); *City of Eugene*, at *1-2 (Attachment 6).

Moreover, the Conservation Groups do not seek to assert any claim against either Inyo County or the United States. The Conservation Groups assert that they "seek to defend the CDPA's [California Desert Protection Act's] prohibition on motor vehicle use in wilderness areas against Inyo County's attempt to undertake road construction activities and establish rights-of-way through such areas." Memo. at 26. That this is an asserted interest – not a claim or defense – is confirmed by the Conservation Groups' proposed answer which brings no counter-claim or cross-claim based on the CDPA. Answer of Proposed Defendant-

Intervenors Sierra Club *et al.* To Plaintiff's Complaint ("Conservation Groups' Proposed Answer"). Nor do the Conservation Groups seek to assert any affirmative defenses not raised by the United States. Conservation Groups' Proposed Answer at 11-12; Defendants' Answer at 15-16.

In sum, the Conservation Groups show no independent basis for jurisdiction for permissive intervention in the first instance, *i.e.*, under the Quiet Title Act, *or* as to any additional causes of action. The Conservation Groups thus fail to meet this requirement for permissive intervention and their request must be denied.

B. The claims of the Conservation Groups concerning management of Death Valley National Park do not present questions of law or fact in common with the quiet title issues raised by Inyo County's R.S. 2477 claim.

In addition to failing to establish independent grounds for jurisdiction, the Conservation Groups fail to raise any claims and defenses that have a question of law or fact in common with the main action. *See generally* Memo.; *see* Conservation Groups' Proposed Answer at 11-12. While the Conservation Groups set forth affirmative defenses asserting that the court lacks subject matter jurisdiction over Inyo County's causes of action, that the claims are barred by the statute of limitations set forth in the Quiet Title Act, and that Inyo County's complaint fails to state a claim for which relief can be granted, those are defenses assertable by (and, in fact, asserted by) the United States; they are not the Conservation Groups' claims or defenses. *See* Conservation Groups' Proposed Answer at 11-12; Defendants' Answer at 15-16. Indeed, the Conservation Groups do not assert any property interest in the land in dispute, the only relevant issue to this quiet title action. At bottom, the Conservation Groups' admitted claims and interests concern the management of Death Valley National Park, which present no questions of law or fact in common with the quiet title issues raised by Inyo County's complaint. *See Allard*, 536 F.2d at 1334 (affirming denial of permissive intervention because applicant's interest in protecting living eagles lacked question

of fact or law in common with constitutional question raised in main action, which had to do with dealing in feathers from "long-dead eagles"). If this suit were a challenge to the United States' land management practices in Death Valley National Park, then the Conservation Groups might have an argument. But what is at issue in the underlying case is whether Inyo County has title to the claimed R.S. 2477 rights-of-way, and the Conservation Groups have not demonstrated that they have any interest whatsoever that is relevant to that question.

In short, the Conservation Groups fail to raise claims and defenses that have a question of law or fact in common with the main action and the court should deny their application for permissive intervention.

CONCLUSION

For the foregoing reasons, the Conservation Groups' motion to intervene as of right, and permissively, should be denied.

Respectfully submitted this 21st day of March, 2007.

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