UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

Docket No. 08-36041

OREGON NATURAL DESERT ASSOCIATION,

Plaintiff-Appellee

v.

KENNY MCDANIEL, Burns District Manager, BLM, **JOAN SUTHER**, Andrews Resource Area Field Manager, BLM, **RICHARD ROY**, Three Rivers Resource Area Field Manager, BLM, **ED SHEPARD**, State Director, Oregon/Washington BLM, **KEN SALAZAR**, Secretary, United States Department of the Interior, **U.S. BUREAU OF LAND MANAGEMENT** and **U.S. DEPARTMENT OF THE INTERIOR**,[[i]]

Defendants,

HARNEY COUNTY, a political subdivision of the State of Oregon,

Defendant-Intervenor,

and

STEENS MOUNTAIN LANDOWNER GROUP,

Defendant-Intervenor-Appellant

v.

CENTER FOR WATER ADVOCACY,

Plaintiff-Intervenor-Appellee.

On Appeal From the United States District Court for the District of Oregon

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ANSWERING BRIEF OF PLAINTIFF-APPELLEE

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[i] Defendants-Appellees-Cross-Appellants Kenny McDaniel (BLM Burns District Manager), Joan Suther (Andrews Resources Area Field Manager), Richard Roy (Three Rivers Resource Area Field Manager), Ed Shepard (BLM OR/WA State Director) and Ken Salazar (Secretary of the Interior) are substituted for their predecessors Dana Shuford, Karla Bird, Joan Suther, Elaine Brong and Gale Norton, respectively, pursuant to Fed. R. App. P. 43(c)(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Oregon Natural Desert Association hereby certifies that it is a non-profit corporation and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF JURISDICTION

Plaintiff-Appellee Oregon Natural Desert Association ("ONDA") agrees with and adopts the Jurisdictional Statement of Defendant-Intervenor-Appellant Steens Mountain Landowner Group ("SMLG"), with one addition. This Court has jurisdiction over appeals of permissive intervention only where if it finds that there was an abuse of discretion. *League of Utd. Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307-08 (9th Cir. 1997). If this Court determines that there was no abuse of discretion, it must dismiss the appeal for want of jurisdiction. *Id.*

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ONDA adopts SMLG's statement.

STATEMENT OF THE STANDARD OF REVIEW

ONDA adopts SMLG's statement of the Standard of Review, with one clarification and one addition. ONDA clarifies that the *de novo* standard for review of denials of intervention under Federal Rule of Civil Procedure 24(a)(2) is correctly stated, *see Prete v. Bradbury*, 438 F.3d 949, 953–54 (9th Cir. 2006), but submits that the Opening Brief incorrectly cites precedent from the U.S. Court of Appeals for the First Circuit. Opening Brief at 11 of 68 (citing *Int'l Paper Co. v. Inhabitants of the Town of Jay, Maine*, 887 F.2d 338, 343 (1st Cir. 1988)).[1] This

[1] The pagination in the footer of SMLG's electronically-filed Opening Brief is largely non-sequential and difficult to follow. Accordingly, ONDA's citations to that brief refer to the pagination shown in the header of the filed-stamped copy

Court reviews the district court's decision concerning permissive intervention pursuant to Federal Rule of Civil Procedure 24(b) for an abuse of discretion. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002).

ONDA adds that the district court's ruling on a motion to intervene is subject to harmless error analysis. Even if the district court erred in denying intervention, the Court must affirm the district court's judgment unless the error affected a party's substantial rights. *See Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1321 & n.1 (9th Cir. 1997) (citing Fed. R. Civ. P. 61).

STATEMENT OF THE CASE

SMLG's Statement of the Case does not conform to the requirement for a brief statement describing the nature of the case and proceedings and disposition below, Fed. R. App. P. 28(a)(6), and adds superfluous statements of alleged fact and argument which mischaracterize the case. ONDA submits that this lawsuit seeks judicial relief ordering the United States Bureau of Land Management ("BLM") to comply with requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321−4370h and the Steens Mountain Cooperative Management and Protection Act ("Steens Act"), 16 U.S.C. §§ 460nnn to 460nnn-122, which govern agency management of public lands in southeast Oregon's high

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served through the CM/ECF system, for example, "Opening Brief at 11 of 68."

desert.[2]

In 2005, BLM's Burns District adopted the Andrews-Steens Resource Management Plan ("RMP" or "Plan"), a land use plan intended to guide management of about 1.6 million acres of public land for the next 20 years. Among other things, the Plan establishes areas open or closed to various uses such as livestock grazing, mineral exploration or energy development, sets allocations for and limits on these uses, and establishes areas open or closed to motorized use including use by off-road vehicles ("ORVs"). ONDA alleges BLM acted arbitrarily and capriciously by adopting the Andrews-Steens RMP without complying with key requirements of NEPA and other federal statutes. ONDA seeks to have the Andrews-Steens RMP set aside until BLM complies with its obligations under federal law and issues a new RMP through a public process consistent with NEPA and the Steens Act.

ONDA filed this action on February 22, 2006. ER Vol. 2 at 291 (Dkt # 1). On September 8, 2006, the district court denied SMLG's motion to intervene in the liability phase of the case, limiting SMLG to intervention to the remedy phase. ER Vol. 2 at 299 (Dkt # 101); ER Vol. 1 at 21. The district court allowed SMLG to participate as amicus curiae and attend oral argument in the liability phase. ER

[2] As described below at pp. 10–11, SMLG's appeal of denial of intervention is moot as to ONDA's original claims under other federal statutes because those statutes are no longer at issue in this case.

Vol. 1 at 21. On June 8, 2007, the district court granted ONDA's motion for partial summary judgment on claim six (based on BLM's violation of the Steens Act) and granted BLM's motion for summary judgment on all other claims. ER Vol. 2 at 308 (Dkt # 187). Following several motions for reconsideration, which the district court denied, the district court issued a final order on October 21, 2008. ER Vol. 2 at 314 (Dkt # 258). On December 5, 2008, SMLG appealed the district court's final order. ER Vol. 2 at 314 (Dkt # 264).

STATEMENT OF THE RELEVANT FACTS

ONDA adopts SMLG's Statement of Relevant Facts, with the following corrections and additions.

First, SMLG mischaracterizes the claims made and relief sought in ONDA's complaint.[3] Opening Brief at 18–19 of 68. ONDA did not seek an order from the district court requiring BLM to make specific changes to the Andrews-Steens RMP. Opening Brief at 18 ("ONDA sought a decision requiring the BLM to supplement[] or amend the Andrews-Steens RMP … [and] an injunction suspending or limiting grazing pending completion of any changes *BLM was required to make by the District Court*" (emphasis added)). Rather, pursuant to the

[3] These factual errors are compounded by SMLG failing to include ONDA's complaint among the Excerpts of Record, despite frequent citations to ONDA's complaint in its Opening Brief. *Compare* SER 1–20 *with* ER Vol. 1 at 1–32 *and* ER Vol. 2 at 1–315; *see* Opening Brief at 10, 12, 17–19, 53 of 68.

terms of the Administrative Procedure Act ("APA"), ONDA sought a decision from the district court declaring BLM's actions in promulgating the RMP and its associated Transportation Plan to be arbitrary and capricious or otherwise contrary to law based on the agency's violation of several statutes in preparing these planning documents. SER 2–3 (Complaint ¶ 2). The relief ONDA sought for the agency's statutory violations were restrictions on use of the public lands within the planning area for grazing, off-road vehicle use, and other site-specific projects that may impair resource values until BLM had complied with its duties under the law. SER 3, 19–20 (Complaint ¶¶ 3, F)

Second, ONDA's Steens Act claims challenged BLM's failure to comply with two provisions of the Act: a statutory duty to prepare a management plan by October 30, 2004 and to include a "comprehensive transportation plan" in that management plan. 16 U.S.C. §§ 460nnn-21(b), -22(a). Nowhere in the paragraphs SMLG cites, nor elsewhere in the complaint, does ONDA seek a district court order that BLM "modify and expand the Transportation Plan incorporated in the Andrews-Steens RMP." Opening Brief at 18 of 68. Rather, ONDA sought a declaration that the Transportation Plan BLM promulgated violated the express provisions of the Steens Act and an order that BLM complete the required "comprehensive" transportation plan by a date certain. SER 2–3, 8–9, 15–17, 19 (Complaint ¶¶ 2(7)–(8), 24, 29, 65–67, 70–73, E).

ONDA requested that the district court order BLM to include an analysis of potential wilderness and ONDA's transportation plan recommendations, but did not ask the court to order any specific outcome of BLM's analysis that would "modify and expand" the Transportation Plan. SER 19 (Complaint ¶ E). And, contrary to SMLG's statement, ONDA's complaint does not allege that "BLM should have further restricted access across public lands within the Andrews-Steens RMP" with respect to access to private property. Opening Brief at 19 of 68 (citing Complaint ¶¶ 2, 71, 73); *see* SER 2–3, 16–17 (Complaint ¶¶ 2, 71, 73). Neither the claims made nor the relief sought in ONDA's complaint challenges interests in access to private property.

ONDA adds that the district court, in addition to permitting SMLG to intervene in the remedial phase of the case, authorized SMLG to participate as amicus curiae in the liability phase and at oral argument. SMLG accordingly has filed 13 substantive briefs and participated fully in the remedial phase of the proceedings. ER Vol. 2 at 295–97, 302–03, 305, 307, 309–13. SMLG's filings include a proposed response in opposition to ONDA's motion for partial summary judgment, (Dkt # 63), an amicus response in opposition to ONDA's motion for summary judgment (Dkt ## 134–36, 142–43), an amicus reply to ONDA's motion for summary judgment (Dkt # 166), an amicus response to ONDA's motion for reconsideration (Dkt # 197), a memorandum in opposition to ONDA's brief

regarding declaratory and injunctive relief (Dkt # 224), an amicus response to ONDA's second motion for reconsideration (Dkt # 235), and a response to ONDA's motion to alter or amend judgment (Dkt # 251). ER Vol. 2 at 295–313; *see infra* n.5 (listing all of SMLG's substantive filings in the district court). Almost all of these filings coincided with BLM filings on the same topics. *See id*.

SUMMARY OF THE ARGUMENT

This panel must follow established precedent holding that a federal agency is the only proper defendant in a case challenging the agency's compliance with federal law. The Court's review therefore is limited to whether the district court correctly applied this Court's Federal Defendant rule in denying intervention as of right under Federal Rule of Civil Procedure 24(a). Because no claims remain in this case except under NEPA and the Steens Act, this Court's review is further limited to whether SMLG is entitled to intervene with respect to those claims.

The district court correctly applied this Court's Federal Defendant rule by determining that the rights and interests asserted by SMLG are not significantly protectable interests in the context of the NEPA and Steens Act claims in this case. SMLG's alleged economic interests are not directly related to the subject matter of ONDA's claims, which involve the validity of BLM's actions in issuing the RMP and Transportation Plan. The Steens Act provisions at issue do not affect access to private lands.

The district court also correctly concluded that SMLG would not assert legal arguments different than BLM, and, accordingly, that BLM would adequately represent the SMLG interests in the subject matter of the litigation. Because SMLG and BLM share an identical interest—defending the Andrews-Steens RMP and Transportation Plan—intervention as of right is proper only if SMLG makes a compelling showing that BLM will not adequately represent its interests. SMLG has made no such showing, and the course of proceedings (including BLM prevailing on five of the six claims in the district court) show conclusively that BLM adequately represents SMLG's interests.

The district court also did not abuse its discretion in denying SMLG's motion for permissive intervention under Federal Rule of Civil Procedure 24(b). In evaluating the factors relevant to permissive intervention, the district court correctly found that SMLG was advancing no legal position distinct from BLM and that BLM would adequately represent SMLG's interest in preserving the Andrews-Steens RMP. To the extent that the district court committed any error in its analysis of intervention, that error was harmless because SMLG participated comprehensively in the substantive briefing on liability and in the remedy phase of the proceedings below, and the district court's disposition of the motion to intervene and the merits of the case do not affect any substantial rights of SMLG.

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ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED BINDING PRECEDENT IN DENYING INTERVENTION AS OF RIGHT UNDER RULE 24(a).

The district court is bound by this Court's precedent precluding intervention by private parties when the federal government is a defendant and only the federal government can be held liable under the claims at issue in the case. The district court here correctly applied this Court's binding precedent.

A. SMLG's Arguments Regarding the Propriety of the Federal Defendant Rule and Case Law in Other Circuits are Inapposite.

As an initial matter, a significant portion of SMLG's brief addresses arguments that are not properly directed to this panel. Just as the district court must follow this Court's precedent, a three-judge panel of this Court must follow established circuit precedent unless a subsequent decision by a relevant court of last resort either effectively overrules the decision in a case "closely on point" or undercuts the reasoning underlying the circuit precedent rendering the cases "clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003). SMLG makes no argument that any intervening Supreme Court precedent justifies the panel's reconsideration of settled circuit precedent.

ONDA takes no position on the propriety of the Federal Defendant rule. Unless the United States Supreme Court, or this Court sitting *en banc*, overturns this Circuit's prior decisions establishing the Federal Defendant rule, this panel

must follow its precedent. *See, e.g.*, *United States v. Hayes*, 231 F.3d 1132, 1139-40 (9th Cir. 2000) (stating that "[i]t is well established that one panel cannot reverse a decision by a previous panel" and that "[o]nly the court sitting *en banc* can reverse the decision of a panel of this circuit"); *United States v. Belgarde*, 300 F.3d 1177, 1181 (9th Cir. 2002) ("a panel not sitting *en banc* has no authority to overturn Ninth Circuit precedent"). Because this panel cannot independently reconsider the merits of the Federal Defendant rule, review is limited to determining whether the district court properly applied the Federal Defendant rule. So much of SMLG's brief as argues for this panel to reconsider the Federal Defendant rule or evaluate Rule 24 precedent from other courts of appeals is immaterial to this Court's review of the district court's action. *See* Opening Brief at 25–47 of 68.

B. SMLG's Arguments Regarding Intervention are Moot Except With Respect to ONDA's Claims Under NEPA and the Steens Act.

In this case, ONDA has appealed only the portion of the district court's decision based on NEPA, and the federal defendants have cross-appealed the portion of the district court's summary judgment in favor of ONDA based on the Steens Act. *See Or. Natural Desert Ass'n v. McDaniel*, No. 08-35942 (9th Cir. filed Oct. 30, 2008); *Or. Natural Desert Ass'n v. McDaniel*, No. 08-36070 (9th Cir. filed Dec. 19, 2008). Although SMLG correctly states that ONDA's complaint in

the district court contained claims under the Federal Lands Policy and Management Act ("FLPMA"), the Public Range Improvement Act ("PRIA"), and the Taylor Grazing Act ("TGA"), those statutes are no longer at issue in this case.

"A case is moot on appeal if no live controversy remains at the time the court of appeals hears the case." *NASD Dispute Resolution v. Judicial Council*, 488 F.3d 1065, 1068 (9th Cir. 2007). Courts may evaluate mootness on a claim-by-claim basis. *See, e.g.*, *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1094–96 (9th Cir. 2003). A claim is moot "where no effective relief for the alleged violation can be given." *Neighbors of Cuddy Mountain v. Alexander,* 303 F.3d 1059, 1065 (9th Cir. 2002). Accordingly, SMLG's appeal is moot to the extent it argues that it is entitled to intervene based on ONDA's claims under FLPMA, PRIA and TGA. There is no effective relief available to SMLG on those claims because they are no longer at issue in this case. Because the underlying dispute regarding FLPMA, PRIA and TGA is now moot, SMLG's challenge to the denial of intervention on those issues is also now moot. *See Or. Natural Desert Ass'n v. Lohn*, No. 07-35700, 2009 WL 123525, at *1 (9th Cir. Jan. 12, 2009).

C. SMLG Does Not Have a Significantly Protectable Interest in the Subject Matter of this Litigation.

Under this Court's four-part test for intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2), an applicant bears the burden of showing that *all* elements for intervention are satisfied. *United States v. Alisal Water Corp.*,

370 F.3d 915, 919 (9th Cir. 2004) (citing *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). Therefore an applicant must demonstrate that:

> (1) it has a significant protectable interest relating to the property or a transaction that is the subject matter of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

Id. SMLG has failed to demonstrate that it has a significant protectable interest related to the subject matter of this action because ONDA's claims solely address the action of the federal government.

1. SMLG does not have a significant protectable interest with respect to the NEPA claims.

The statutory provisions that form the basis of the remaining live claims in this case—NEPA and the Steens Act—regulate only the action of the federal government. *See* SER 12–13, 15–17 (Complaint at ¶¶ 45, 54, 65, 70–72); *Kootenai Tribe*, 313 F.3d at 1108 ("NEPA requires action only by the government, only the government can be liable under NEPA. Because a private party can not violate NEPA, it can not be a defendant in a NEPA compliance action") (internal quotations and citation omitted). The provisions in dispute do not impose or confer any duties, rights, or obligations on private parties, including SMLG or its members; nor do the claims implicate private lands.

SMLG relies in part on its members' livestock grazing permits issued under FLPMA and the TGA to assert it has a "significant protectable interest" in this issues involved in this case. *See, e.g*. Opening Brief at 17 of 68; 46 of 68. SMLG argues that those permits are "protected by law" including various procedural safeguards. However, the laws governing issuance and management of grazing permits are no longer at issue in this case. The grazing permits are not issued pursuant to BLM's planning obligations under NEPA or the Steens Act; therefore the permits cannot form the basis for any protectable interest in the remaining subject matter of this litigation.

For an interest to rise to the level of a "significant protectable interest" justifying intervention as of right, the interest must be protected by law and must be "related to the claims at issue." *Arakaki v. Cayetano*, 324 F.3d 1078, 1085 (9th Cir. 2003). The "relationship" requirement is satisfied "only if the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998). A speculative, indirect relationship between a plaintiff's claims and the alleged interest does not satisfy the significant protectable interest requirement. *Greene v. United States*, 996 F.2d 973, 976–78 (9th Cir. 1993) (an applicant lacked a significant protectable interest where the resolution of the plaintiff's claims would not affect the applicant directly). SMLG argues that changes to the RMP, if BLM is found to have violated its obligations under NEPA

and the Steens Act, "could change the balance of uses provided for in the existing RMP and change the level of use allowed under SMLG members' permits." Opening Brief at 19 of 68. Such speculative possible effect does not satisfy the requirement that the alleged interest be directly related to the claims at issue.

The conclusion that SMLG lacks a significant protectable interest is underscored by the fact that grazing permits are merely privileges granted at BLM's discretion. A grazing permit "shall not create any right, title, interest, or estate in or to [BLM-administered public] lands." 43 U.S.C. § 315b; *see Osborne v. United States*, 145 F.2d 892, 896 (9th Cir. 1944) ("it has always been the intention and policy of the government to regard the use of its public lands for stock grazing . . . as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation"); *see also Public Lands Council v. Babbitt*, 529 U.S. 728, 735 (2000) (explaining that conditions placed on permits reflect the "leasehold nature of grazing privileges"; that Congress has "made the grant of grazing privileges discretionary"; and that the federal government "retained the power to modify, fail to renew, or cancel a permit or lease for various reasons").

This type of pure economic expectancy is not a significant protectable interest under this Court's case law. *Alisal*, 370 F.3d at 920 (holding that a right to collect a debt was not sufficiently related to environmental claims in the action);

So. Cal. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002) (holding that an alleged right to payment for electricity transactions was not sufficiently related to challenges to actions of the California Public Utilities Commission). In fact, a "non-speculative, economic interest may be sufficient to support a right of intervention" *only* when the interest is "concrete and related to the underlying subject matter of the action," *Alisal*, 370 F.3d at 919–20, and when the interest is "direct, non-contingent, substantial and legally protectable." *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981) (citation omitted).

SMLG also points to ONDA's request for an injunction against grazing and off-road vehicle use pending BLM's completion of a revised RMP. Opening Brief at 18 of 68. However, this ONDA request goes only to the relief sought only upon the district court's determination that BLM has not complied with its statutory duties. *See, e.g.*, SER 3, 19–20 (Complaint ¶¶ 3, E) (requesting injunction against grazing pending preparation of a valid RMP). SMLG was, and will be, allowed to participate as a full party in the relief phase of the proceedings below. ER Vol. 1 at 21; ER Vol. 2 at 299 (Dkt # 101), 311 (Dkt # 224). Because the district court allowed SMLG to intervene as a full party in any remedy phase of the proceedings, SMLG's argument that it cannot protect its members' interest in grazing with respect to ONDA's requested injunction fails.

2. SMLG does not have a significant protectable interest with respect to the Steens Act claims.

SMLG also seeks intervention based on a vague alleged interest in defending "the goals of the Steens Act." Opening Brief at 18 of 68. However, none of the Steens Act provisions SMLG cites in its brief are at issue in this case. *See* Opening Brief at 14 of 68 (citing provisions relating to the Steens Mountain Advisory Council), 16 of 68 (citing provisions relating to balancing environmental protection with recreational and commercial uses of private lands), 52 of 68 (citing the provision of reasonable access to private lands in 16 U.S.C. § 460nnn-22(e)(1)). Oddly, SMLG does not actually cite the only two Steens Act provisions which *are* involved in this case.

The only Steens Act provisions at issue in this action—setting forth BLM's duty to prepare a "comprehensive transportation plan" that is an "integral" part of the management plan for the Steens Mountain Cooperative Management and Protection Area ("CMPA")—are directed solely at the Secretary and the BLM. 16 U.S.C. §§ 460nnn-21(b), -22(a); *see* SER 15–16 (Complaint ¶¶ 65, 67, 70–71). ONDA alleged that the 8-page Transportation Plan included as an appendix to the RMP was not sufficiently "comprehensive" to comply with the Act. SER 15–16 (Complaint ¶¶ 65–67); *see Or. Natural Desert Ass'n v. Shuford*, No. 06-242-AA, 2007 WL 1695162, at *17–*19 (D. Or. June 8, 2007). Neither this agency

obligation, nor anything else in the Steens Act, requires or regulates actions by private parties. *See, e.g.*, *id.* § 460nnn-21 ("Management authorities and purposes," directing Secretary of the Interior to undertake certain management of CMPA), §§ 460nnn-101 to -105 (land exchange provisions, which are not at issue in this case, are on a "willing buyer-seller" basis).

Similarly, access to private property is not at issue, nor under threat, in this action. SMLG's members own land within and adjacent to Steens Mountain's CMPA and may access their property across public land. Opening Brief at 13 of 68. SMLG claims that if ONDA prevails, "access to its members' land and its members' grazing and commercial recreational uses could be restricted or eliminated." Opening Brief at 53 of 68. SMLG also claims that it will be "bound by the court's determination as to the meaning and purpose of the Steens Act in future litigation." Opening Brief at 55 of 68.

These statements are wrong. None of the Steens Act provisions at issue or the relief requested affect the rights of private individuals to access their private lands. *See* SER 11–20 (Complaint at ¶¶ 44–78, A–H). Although ONDA would like to see obsolete routes or routes which cause resource damage within the CMPA closed (via a public process), it fully supports "grandfathering" historic uses for private access purposes. ONDA has not, and will not, ask that any route be closed as part of any potential injunctive relief in this action. *See* SER 19–20 (Complaint

at F) (referring to activities such as grazing and off-highway vehicle use, but not to access to private property). The claims related to the Steens Act target the BLM's failure or refusal to comply with specific non-discretionary duties under federal law. No claim in this action targets access to private property. Similarly, it is incorrect for SMLG to contend that it could be in any way "bound" by the interpretation of statutory provisions that impose clear planning obligations on BLM. The "purpose" of the Steens Act is not at issue in the interpretation of the transportation plan obligations.

Finally, if this Court upholds the district court's holding that the Transportation Plan does not comply with the Steens Act, *Shuford*, 2007 WL 1695162, at *18–*19, the SMLG members, along with ONDA and other members of the public, would be free to take part in whatever level of public participation the BLM offers during its process of developing a legally sufficient Transportation Plan. As a result, SMLG does not have a "significant protectable interest" in whether the BLM violated NEPA or the specific provision of the Steens Act at issue in this case.

D. BLM Adequately Represented SMLG's Interests.

SMLG incorrectly states the standard this Court applies in evaluating the adequacy of representation when a proposed intervenor shares the identical ultimate objective with one of the parties in the case. Opening Brief at 55–56 of 68.

This Court recognizes that "[t]he most important factor in determining the adequacy of representation is how the [applicant's] interest compares with the interests of existing parties." *Arakaki*, 324 F.3d at 1086. Where "the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Id*. Absent "a 'very compelling showing to the contrary,'" it is presumed that the government will adequately represent its citizens when the interests align. *Id*. (quoting 7C Charles Alan Wright *et al*., Federal Practice and Procedure: Civil 2d § 1909, at 332). SMLG has made no such compelling showing.

Indeed, SMLG concedes that its interest in the specific claims presented in ONDA's complaint is identical to that of BLM: "SMLG clearly intended to defend the BLM's Andrews-Steens RMP and Transportation Plan as an intervenor." Opening Brief at 60 of 68. This Court has been clear that "[w]here parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Arakaki*, 324 F.3d at 1086 (citing *City of Los Angeles*, 288 F.3d at 402). For both BLM and SMLG, the ultimate objective is preservation of the Andrews-Steens RMP in its current form.

In *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), this Court reversed a grant of intervention under Rule 24(a), holding that a proposed intervenor failed to make a compelling showing that the state government would not adequately

represent the applicant's interest in defending the validity of a ballot measure. 438 F.3d at 957. As in that case, SMLG has made no showing here, much less a compelling one, that BLM's defense of the interest at issue in this case—preservation of the Andrews-Steens RMP—will not be adequate. Opening Brief at 55–56.

SMLG makes a vague claim of having divergent interests from BLM, without describing how those interests diverge in the context of defending the validity of the RMP. Opening Brief at 56 of 68. The district court rejected similar claims by both Harney County and SMLG below. ER Vol. 1 at 11–13, 20. In denying Harney County's Rule 24(a) motion for intervention as of right, the district court correctly concluded that "[d]uring the liability phase, the County has the same interest as the BLM and any other member of the public: an interest in assuring that the federal defendants have complied with all applicable federal laws." ER Vol. 1 at 13; *see also* ER Vol. 1 at 14 ("Harney County fails to demonstrate that any legal position it might advance concerning plaintiff's claims is any different than the position advanced by BLM"). The district court's ruling on SMLG's motion to intervene, following its ruling on Harney County's motion, implicitly concluded that BLM would adequately represent SMLG in this matter. ER Vol. 1 at 20 ("I find that SMLG fails to demonstrate that any legal position it

might advance concerning plaintiff's claims is any different than that of the BLM's").[4]

In point of fact, BLM has zealously defended the Andrews-Steens RMP and its Transportation Plan, prevailing on all but one claim in the district court and filing a cross-appeal in this Court on the one claim for which the district court granted summary judgment for ONDA. *Or. Natural Desert Ass'n v. Shuford*, 2007 WL 1695162, at *1; *Or. Natural Desert Ass'n v. McDaniel*, No. 08-36070 (9th Cir. filed Dec. 19, 2008). SMLG has failed to articulate any way in which BLM did not, or would not, vigorously defend the legality of its actions in promulgating the Plan. *Cf. Kootenai Tribe*, 313 F.3d at 1111 (distinguishing an instance where intervention was allowed where federal government "declined to defend fully from the outset, suggesting that the government itself saw problems [with the challenged federal action]").

Furthermore, despite having filed over 13 briefs as amicus curiae below, SMLG has not articulated any way in which BLM's defense of the Andrews-

[4] To the extent that the district court did not expressly evaluate this element of the intervention analysis, this Court may still affirm the district court's decision on any ground supported by the record, even if not relied upon by the District Court. *Forest Guardians*, 329 F.3d at 1097; *see also Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (affirming on different ground than that relied upon by district court). Accordingly, the decision may be affirmed, "even if the district court relied on the wrong grounds or wrong reasoning." *Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998) (citation omitted).

Steens RMP failed to protect the shared interest of defending the legality of the RMP. SMLG filed 13 substantive briefs in support of BLM's defense of the Andrews-Steens RMP and in opposition to ONDA's motions. In every instance, SMLG's filings sought the same ultimate objective as BLM's contemporaneous filings: preservation of the legality of the Andrews-Steens RMP. ER Vol. 2 at 295–97, 302–03, 305, 307, 309–13.[5]

SMLG therefore was in a position at all times during the district court proceedings to evaluate whether BLM was, in fact, adequately defending the Andrews-Steens RMP, and to move the district court for reconsideration of its order denying intervention if, at any time, BLM ceased to vigorously defend the validity of the Plan or took a position that would materially jeopardize SMLG's

[5] SMLG filed a proposed opposition to ONDA's motion to consolidate this case with other pending cases (Dkt # 57), a proposed response in opposition to ONDA's motion for partial summary judgment, (Dkt # 63), a response to the defendants' motion to stay (Dkt # 79), an amicus response in opposition to ONDA's motion for summary judgment (Dkt ## 134–36, 142–43), an amicus response to intervenor Center for Water Advocacy's motion for extension of time (Dkt # 161), an amicus reply to ONDA's motion for summary judgment (Dkt # 166), a response to ONDA's notice of factual development (Dkt # 184), an amicus response to ONDA's motion for reconsideration (Dkt # 197), a response in opposition to ONDA's motion for leave to file a proposed form of judgment (Dkt # 208), a memorandum in support of BLM's motion to proceed with the remedy phase (Dkt # 215), a memorandum in opposition to ONDA's brief regarding declaratory and injunctive relief (Dkt # 224), an amicus response to ONDA's second motion for reconsideration (Dkt # 235), and a response to ONDA's motion to alter or amend judgment (Dkt # 251). ER Vol. 2 at 295–97, 302–03, 305, 307, 309–13. Almost all of these filings coincided with BLM filings on the same topics. *See id.*

alleged rights and interests. Yet, despite filing more than a dozen pleadings as amicus curiae in the district court, SMLG never moved for reconsideration of the denial of intervention. ER Vol. 2 at 299–315 (district court docket after denial of intervention (Dkt # 101)); *see Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (noting among the factors to be considered in evaluating a motion to intervene is "whether changes have occurred in the litigation so that intervention that was once denied should be reexamined").

SMLG cannot now complain based on abstract arguments regarding its alleged rights and interests that BLM did not adequately defend against ONDA's claims or that it would have presented any arguments that BLM did not present or which the district court did not consider. Most importantly, SMLG has not and cannot make the "compelling showing" of inadequate representation required for intervention under Rule 24(a).

SMLG argues that *any* party that participates in the development of federal legislation is a proper intervenor in a case construing that legislation. Opening Brief at 47–48 of 68. However, SMLG misconstrues this Court's precedent, particularly the holding in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527–28 (9th Cir. 1983). Notably, this Court has limited *Sagebrush Rebellion* to instances where a proposed intervenor involved in developing legislation has a position materially different than the government agency which faces a challenge under that

legislation. *Prete*, 438 F.3d at 956–59; *see Sagebrush Rebellion*, 713 F.2d at 528 (justifying intervention by conservation group where the lead federal defendant, then-Secretary of the Interior James Watt, had previously headed the same legal organization representing the plaintiffs in the suit). When a proposed intervenor seeks only to defend an agency's interpretation of a statute which the agency itself is vigorously defending, the case comes within this Court's existing Federal Defendant rule.

E. The District Court Properly Applied This Court's Federal Defendant Rule.

As noted above, SMLG gears much of its brief to asking this panel to reconsider the Federal Defendant rule. *See supra* at 9–10; Opening Brief at 25–47 of 68. However, because that rule is binding under this Court's precedent, SMLG may only challenge the application of the rule. The Federal Defendant rule establishes that private parties cannot intervene as a matter of right in NEPA compliance actions because they cannot establish a "significantly protectable interest" in the litigation. *Kootenai Tribe*, 313 F.3d at 1108. Despite this rule, SMLG sought full intervention in what is fundamentally a NEPA compliance case.

The premise behind the Federal Defendant rule is that because NEPA and other statutes that impose duties only upon federal agencies, not private parties, only federal agencies can violate NEPA. Thus federal agencies are the only

appropriate defendants in a suit under NEPA or comparable statutes. Consequently, "private intervenors may not intervene as of right pursuant to Rule 24(a)." *Kootenai Tribe*, 313 F.3d at 1108; *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000) (upholding district court's denial of a permittee's application to intervene as of right in a NEPA case); *Churchill County v. Babbitt*, 150 F.3d 1072, 1082-1083 (9th Cir. 1998) (upholding district court's denial of a public utility's application to intervene as of right in a NEPA case); *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989) (timber industry denied intervention as of right in NEPA case challenging logging).

None of ONDA's claims targets private parties, let alone the SMLG. ONDA's claims allege only that BLM has failed to comply with mandatory obligations under NEPA and the Steens Act. *See supra* at 2–3, 10–11. This case presents a textbook application of the Federal Defendant rule. SMLG sought to intervene as of right in an action involving NEPA compliance and a question of pure statutory interpretation under the Steens Act. The district court correctly applied the Federal Defendant rule to deny SMLG's motion to intervene. This panel likewise must apply the Federal Defendant rule and accordingly should affirm the district court's ruling.

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II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION UNDER RULE 24(b).

SMLG also argues that the district court erred by denying it permissive intervention. A district court has broad discretion to grant or deny a motion for permissive intervention. Fed. R. Civ. P. 24(b)(1);[6] *see Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974) (regarding permissive intervention under Rule 24(b), "this Court has held that the exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown") (internal quotations, alterations and citations omitted). Such is the breadth of the district court's discretion in this regard that one appellate court has noted that "a denial of permissive intervention has virtually never been reversed." *New York News, Inc. v. Kheel*, 972 F.2d 482, 487 (2d Cir. 1992).

When considering whether to grant intervention permissively, Rule 24(b) states that a court "*may permit* anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1) (emphasis added). Even where the "literal requirements of Rule 24(b)"

[6] The rule regarding permissive intervention by non-governmental parties was renumbered from Rule 24(b)(2) to Rule 24(b)(1)(B) in the course of the 2007 stylistic amendments to the Federal Rules of Civil Procedure. *See* Report of the Civil Rules Advisory Committee, June 2, 2006 (Revised July 20, 2006) at 71, *available at* http://www.uscourts.gov/rules/supct1106/Excerpt_CV_Style.pdf (last visited Jan. 15, 2010). The change was meant to be stylistic only and does not affect case law prior to 2007 construing the previous Rule 24(b)(2). *Id*. at 72.

are met, it remains within district court's discretion to decide if intervenors can participate. *Id.* at 1110-11; *Donnelly*, 159 F.3d at 412. The District Court is "then entitled to consider other factors in making its discretionary decision on the issue of permissive intervention." *Spangler*, 552 F.2d at 1329. Relavant factors include "the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case." *Id.* (internal citations omitted). The court may also consider "whether the intervenors' interests are adequately represented by other parties." *Id.*

Here, the district court explained that "the only issue in the liability phase of this litigation is whether the BLM complied with NEPA, FLPMA and other federal statutes," that only BLM can be held liable under these statutes and that only "BLM can be ordered to comply with the statutory provisions at issue" in ONDA's claims. ER Vol. 2 at 20. The court evaluated the legal position SMLG sought to advance and the adequacy of BLM's representation of SMLG's interest in upholding the Andrews-Steens RMP, and properly concluded that "SMLG fails to demonstrate that any legal position it might advance concerning [ONDA's] claims is any different than that of BLM's." ER Vol. 2 at 20.

SMLG's Opening Brief likewise fails to demonstrate any legal position SMLG proposed to take or took in the course of its many filings in the district court that was substantially different than BLM's position with respect the ultimate

objective SMLG shared with BLM: preserving the Andrews-Steens RMP. Because SMLG shared the same ultimate objective with BLM, and because SMLG advanced no legal positions different from BLM regarding BLM's compliance with the statutes at issue in ONDA's claims, the district court did not abuse its discretion in denying SMLG permissive intervention under Rule 24(b). *Arakaki*, 324 F.3d at 1086; *City of Los Angeles*, 288 F.3d at 402.

III. ANY ERROR BY THE DISTRICT COURT IS HARMLESS AND DOES NOT AFFECT SMLG'S SUBSTANTIAL RIGHTS.

Even if the district court erred in denying intervention, any error was harmless. This Court may not reverse the district court's judgment "unless this error affected the 'substantial rights of the parties.'" *Prete*, 438 F.3d at 960 (citations and quotation omitted); *see Suburban Propane Gas Corp.*, 123 F.3d at 1321 & n.1 (citing Fed. R. Civ. P. 61). Where a party is not entitled to any relief from the Court, a party's substantial rights are not affected and affirmance based on harmless error is appropriate. *In re Benny*, 791 F.2d 712, 722 n.13 (9th Cir. 1986) (where an applicant's position prevailed below and the applicant submitted arguments on the merits, even erroneous denial of intervention does not affect substantial rights warranting reversal).

SMLG participated as amicus curiae before the district court, received all filings via the CM/ECF system, and attended oral argument. SMLG acknowledges that it fully availed itself of the opportunity to "defend the BLM's Andrews-Steens

RMP and Transportation Plan" by filing an extensive Response in the capacity of amicus curiae to ONDA's motion for summary judgment. Opening Brief at 60 of 68; ER Vol. 2 at 302 (Dkt ## 134–36). SMLG filed 12 other substantive briefs in the district court. *See supra* n.5. BLM prevailed on five of ONDA's six claims, and the holding regarding the illegality of the Transportation Plan was based on the plain language of the Steens Act requiring nondiscretionary action by BLM. *Shuford*, 2007 WL 1695162, at *1, *18.

SMLG exhaustively presented its arguments on the merits to the district court in support of BLM's position on the validity of the RMP. *See supra* n.5 and accompanying text. Yet SMLG does not explain how the outcome below would have been any different if it had been granted intervention. In light of its thorough participation in briefing the merits of this case, albeit filing as an amicus curiae, SMLG cannot show that it would have proceeded any differently with respect to the Transportation Plan claim if it had been granted intervenor status. In these circumstances, any error by the district court in denying intervention was harmless and this Court should affirm the district court's judgment. *Prete*, 438 F.3d at 959–60.

CONCLUSION

For the foregoing reasons, ONDA respectfully requests this Court affirm the decision of the district court.

Dated January 19, 2010

Respectfully submitted,

s/ David H. Becker

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Of Attorneys for Plaintiff-Appellee

STATEMENT OF RELATED CASES

The following related cases currently are pending before this Court:

- *Oregon Natural Desert Association v. McDaniel*, Nos. 08-35942, 08-36070 (ONDA appeal of Andrews Steens RMP and federal defendants' cross-appeal), consolidated with this case for briefing and argument.

- *Oregon Natural Desert Association v. Bureau of Land Management*, No. 05-35931 (Southeastern Oregon RMP).

- *Oregon Natural Desert Association v. Gammon*, No. 07-35728 (Lakeview RMP).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,176 words.

1/19/2010
____
Date

s/ David H. Becker
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PROOF OF SERVICE

I hereby certify that on January 19, 2010, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that true and correct copies of ONDA's Supplemental Excerpts of Record were transmitted via First Class Mail on January 19, 2010 to the following parties:

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