

**CASE NO.**

**IN THE SUPREME COURT OF THE  
UNITED STATES**

**ROBERT KINGHORN,  
THE LAW OFFICES OF FREDERICK HUFF,**

**Petitioners,  
v.**

**UNITED STATES,**

**Respondent.**

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit

**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

What is the correct legal standard of review for determining a Motion to Intervene as of right as well as a Motion to Permissively Intervene when the United States Courts of Appeals are split on the appropriate standard of review.

**PARTIES TO THE PROCEEDINGS**

All parties are named in the caption.

**CORPORATE DISCLOSURE STATEMENT**

Petitioner, The Law Offices of Frederick Huff (Huff) has no parent corporation or any publicly held company that owns 10% or more of its stock.

**STATEMENT OF RELATED PROCEEDINGS**

This matter arises to obtain full payment of the remaining unpaid obligations of the United States to satisfy judgments rendered by the United States District Court for the District of Colorado and the United States Court of Federal Claims:

*Ground Improvement Techniques, Inc. v. Morrison Knudsen Corporation d/b/a MK-Ferguson Company*, United States District Court for the District of Colorado, Case No. 95-cv-2510-JLK-BNB, (Second Modified Amended Judgment entered January 13, 2009).

*URS Energy & Construction, Inc., for the use and benefit of the secured creditors of Ground Improvement Techniques, Inc; PNC Bank, N.A.; Fireman's Fund Insurance Company; and R.N. Robinson & Sons, Inc. v. The United States*, United States Court of Federal Claims, Case No. 12-57C, (Judgment entered January 30, 2019).

**TABLE OF CONTENTS**

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS.....	ii
CORPORATE DISCLOSURE STATEMENT .....	ii
STATEMENT OF RELATED PROCEEDINGS.....	ii
TABLE OF CONTENTS.....	iii
APPENDIX CONTENTS.....	iv
TABLE OF AUTHORITIES .....	v
RULES OF THE COURT .....	vi
PETITION FOR WRIT OF CERTIORARI .....	1
OPINIONS BELOW.....	1
JURISDICTION .....	3
STATUTORY/RULE PROVISION INVOLVED .....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE PETITION.....	6
CONCLUSION.....	10

**APPENDIX CONTENTS**

Appendix A

Order on Petition for Panel Rehearing and Rehearing En Banc, United States Court of Appeals for the Federal Circuit, August 5, 2020 ..... App-1-2

Appendix B

Opinion, United States Court of Appeals for the Federal Circuit, May 18, 2020 ..... App-3-4

Appendix C

Judgment, United States Court of Appeals for the Federal Circuit, May 18, 2020 ..... App-5-6

Appendix D

Order Denying Motion to Intervene, United States Court of Federal Claims, April 30, 2019 ..... App-7-13

Appendix E

Opinion, United States Court of Appeals for the Federal Circuit, July 28, 2015) ..... App-14-33

Appendix F

Opinion and Order, United States Court of Federal Claims, April 30, 2014 ..... App-34-48

Appendix G

Opinion and Order, United States Court of Federal Claims, May 3, 2013 ..... App-49-57

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

<i>Am. Mar. Transp., Inc. v. United States</i> , 870 F.2d 1559 (Fed. Cir. 1989).....	7
<i>Am. Renovation &amp; Const. Com. v. United States</i> , 65 Fed. Cl. 254 (2005) .....	6
<i>Brody v. Spang</i> , 957 F.2d 1108 (3d Cir. 1992).....	6
<i>Chippewa Cree Tribe of Rocky Boy's Reservation v. United States</i> , 85 Fed. Cl. 646 (2009).....	6
<i>Geiger v. Foley Hoag LLP Ret. Plan</i> , 521 F.3d 60 (1st Cir. 2008).....	6
<i>Ground Improvement Techniques, Inc. v. United States</i> , 618 Fed. Appx. 1020 (Fed. Cir. 2015) .....	2, 8
<i>In re Sierra Club</i> , 945 F.2d 776 (4 <sup>th</sup> Cir. 1991) .....	6
<i>McDonald v. E.J. Lavino Co.</i> , 430 F.2d 1065 (5th Cir. 1970) .....	9
<i>Nissei Sangyo Am. Ltd. v. United States</i> , 31 F.3d 435 (7th Cir. 1994) .....	6
<i>Person v. N.Y. State Bd. of Elections</i> , 467 F.3d 141 (2d Cir. 2006).....	6
<i>S. Dakota v. Ubbelohde</i> , 330 F.3d 1014 (8th Cir. 2003).....	6
<i>Sierra Club v. Espy</i> , 18 F.3d 1202 (5th Cir. 1994) .....	6, 8, 9
<i>Stallworth v. Monsanto Co.</i> , 558 F.2d 257 (5th Cir. 1977) .....	9
<i>United States v. Aerojet Gen. Corp.</i> , 606 F.3d 1142 (9th Cir. 2010) .....	6

*United States v. Albert Inv. Co.*,  
585 F.3d 1386 (10th Cir. 2009) .....6

*Wolfsen Land & Cattle Co. v. Pac. Coast of Fisherman’s Assoc.*,  
695 F.3d 1310 (Fed. Cir. 2012).....6

**RULES OF THE COURT OF FEDERAL CLAIMS**

Rule 19, RCFC..... 3

Rule 20, RCFC.....4

Rule 24(a), RCFC .....3, 6, 7

Rule 24(b), RCFC .....3

**PETITION FOR WRIT OF CERTIORARI**

Petitioners, Robert Kinghorn (Kinghorn) and the Law Offices of Frederick Huff (Huff) are subject to forfeiture of over \$7.5 million dollars in Judgment awards that are the obligation of the United States to pay after their Motions to Intervene as a matter of right, or alternatively Motions to Permissively Intervene were denied.

The present denial highlights the impact of the split of authority in addressing Motions to Intervene by the various United States Courts of Appeals that resulted in forfeiture of the rights of the Petitioners for over \$7.5 million dollars.

Kinghorn and Huff, have been materially impacted by the disparity regarding the proper standard of review as it applies to Motions to Intervene. Accordingly, Kinghorn and Huff respectfully petition this Court for a Writ of Certiorari to review the United States Court of Appeals for the Federal Circuit Opinion.

**OPINIONS BELOW**

This case arises from the multiple rulings of the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit:

The August 5, 2020 unpublished Opinion of the United States Court of Appeals for the Federal Circuit, *URS Energy & Construction, Inc., for the use and benefit of the secured creditors of Ground Improvement Techniques, Inc.; PNC Bank, N.A.; Fireman's Fund Insurance Company; and R.N. Robinson & Sons, Inc. v. United States of America*, (App-1-2), Case No. 2019-2101, denying the combined Petition for Rehearing and Rehearing En Banc.

The May 18, 2020 unpublished Opinion of the United States Court of Appeals for the Federal Circuit, *URS Energy & Construction, Inc., for the use and benefit of the secured creditors*



*of Ground Improvement Techniques, Inc.; PNC Bank, N.A.; Fireman's Fund Insurance Company; and R.N. Robinson & Sons, Inc. v. United States of America*, (App-3-4), Case No. 2019-2101.

The May 18, 2020 unpublished Judgment of the United States Court of Appeals for the Federal Circuit, *URS Energy & Construction, Inc., for the use and benefit of the secured creditors of Ground Improvement Techniques, Inc.; PNC Bank, N.A.; Fireman's Fund Insurance Company; and R.N. Robinson & Sons, Inc. v. United States of America*, (App-5-6), Case No. 2019-2101.

The April 30, 2019 unpublished Order of the United States Court of Federal Claims, *URS Energy & Construction, Inc., for the use and benefit of the secured creditors of Ground Improvement Techniques, Inc.; PNC Bank, N.A.; Fireman's Fund Insurance Company; and R.N. Robinson & Sons, Inc. v. United States of America*, (App-7-13) Case No. 12-57C.

The July 28, 2015 unpublished Opinion of the United States Court of Appeals for the Federal Circuit, *Ground Improvement Techniques, Inc., MK Ferguson Company, for the use and benefit of Ground Improvement Techniques, Inc. v. United States*, 618 Fed. Appx. 1020 (Fed. Cir., 2015) (App-14-33).

The April 30, 2014 unpublished Opinion and Order of the United States Court of Federal Claims, *Ground Improvement Techniques, Inc., MK Ferguson Company, for the use and benefit of Ground Improvement Techniques, Inc. v. United States*, (App-34-48) Case No. 12-57C.

The May 3, 2013 unpublished Opinion and Order of the United States Court of Federal Claims, *Ground Improvement Techniques, Inc., MK Ferguson Company, for the use and benefit of Ground Improvement Techniques, Inc. v. United States*, (App-49-57) Case No. 12-57C.

**JURISDICTION**

The United State Court of Appeals for the Federal Circuit entered Judgment on May 18, 2020 (App-5-6) and thereafter denied timely combined petitions for rehearing and rehearing en banc on August 5, 2020 (App-1-2). This Court has jurisdiction pursuant to 28 U.S.C. §1251(1).

**STATUTORY/RULE PROVISIONS INVOLVED**

Rule 24(a), RCFC,

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

Rule 24, RCFC

Rule 19, RCFC, Required Joinder of Parties,

- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
  - (i) as a practical matter impair or impeded the person's ability to protect the interest; or
  - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19, RCFC

Rule 24(b), RCFC, permissive intervention:

Permissive Intervention.

- (1) In General. On timely motion, the court may permit anyone to intervene who: ...

- (B) has a claim or defense that shares with the main action a common question of law or fact.

Rule 24(b), RCFC

Rule 20(a)(1)RCFC:

- (1) Plaintiffs. Persons may join in one action as plaintiffs if:
- (A) they assert any right to relief jointly, severally, or in the alternative, with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- (B) any question of law or fact common to all plaintiffs will arise in the action.

Rule 20(a)(1), RCFC

### **STATEMENT OF THE CASE**

Petitioners, Kinghorn and Huff, as the last remaining real parties in interest, moved to intervene in the underlying case to obtain amendment of the Judgment rendered against the United States. (App-7-13). The Judgment did not award all of the post-Judgment interest that the Government was contractually obligated to pay per its total cost reimbursement prime contract with general contractor, URS Energy & Construction, Inc. (URS). Denying the Motions to Intervene severely prejudice Kinghorn and Huff, causing forfeiture of over \$7.5 million dollars in interest and costs.

In 1983, URS entered into a cost reimbursement prime contract with the Government for a uranium reclamation Project. (App-15). URS subcontracted with Ground Improvement Techniques, Inc. (GIT) to perform portions of the required Project work. (App-15-16). URS, with Government approval, wrongfully terminated the GIT subcontract in September 1995. (App-17).

On January 13, 2009, the United States District Court for the District of Colorado rendered a Second Modified Amended Judgment (GIT Judgment) in favor of Subcontractor, GIT against

the Government's Prime Contractor, URS for the wrongful termination. (App-17). The entire GIT Judgment award is a pass-through contractual obligation of the United States per its total cost reimbursement prime contract with URS.

Independent bankruptcy proceedings on behalf of both URS and GIT expressly preserved GIT's pass-through liability claims against the Government for the 1995 wrongful termination. GIT's Pennsylvania Bankruptcy Court allocated the wrongful termination recovery to PNC Bank, Fireman's Fund Insurance Co., Holland & Knight, LLP, The Law Offices of Frederick Huff, R.N. Robinson & Sons, Inc., and Robert Kinghorn, as the real parties in interest, pursuant to an Agreement Respecting Litigation. (App-17). URS' Nevada Bankruptcy Court directed that the GIT pass through Judgment award against URS be preserved and collected from the Government by URS for the benefit of GIT. (App-8-9).

URS, as represented by Three GIT Creditors for the use and benefit of GIT, proceeded to enforce the Government's contractual obligation to pay and satisfy the GIT pass through Judgment against URS in the United States Court of Federal Claims.

On January 30, 2019, the Court of Federal Claims rendered judgment against the United States for the pass-through amount of \$9,842,711.83 and a portion of the interest previously awarded by the United States District Court for the District of Colorado. (App-8-n.2).

As the last remaining real parties in interest in the Judgment award shortfall, Kinghorn and Huff timely moved to intervene seeking to alter or amend the Claims Court's January 30, 2019 Judgment. (App-7-13). The only opposition to the Motion to Intervene was from the United States.

On April 30, 2019, the Claims Court denied the intervention motion at the behest of only the Government. (App-7-13). Therefore, Kinghorn and Huff timely noticed an appeal of the

intervention denials to the United States Court of Appeals for the Federal Circuit. (App-3-4). The Federal Circuit affirmed the intervention denials thereby imposing a forfeiture on the Petitioners, Kinghorn and Huff of over \$7.5 million dollars.

### **REASONS FOR GRANTING THE PETITION**

The Federal Circuit's May 18, 2020 Opinion overlooks the factors and circumstances for evaluating an intervention motion and misapplies an abuse of discretion standard instead of a *de novo* standard in accordance with the greater weight of authority. *See, Wolfsen Land & Cattle Co. v. Pac. Coast of Fisherman's Assoc.*, 695 F.3d 1310, 1314 (Fed. Cir. 2012) (comparing *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010) (applying *de novo* review), *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1390 (10th Cir. 2009) (applying *de novo* review), *S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1024 (8th Cir. 2003) (applying *de novo* review), *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (applying *de novo* review), and *Nissei Sangyo Am. Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994) (applying *de novo* review)).

The minority position applying an abuse of discretion standard of review has been used only by the First Circuit, *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 64 (1st Cir. 2008); Second Circuit, *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006); Third Circuit, *Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992); and Fourth Circuit, *In re Sierra Club*, 945 F.2d 776, 779 (4<sup>th</sup> Cir. 1991).

Rule 24(a)(2), RCFC requires an applicant be allowed to intervene as a matter of right where: (1) intervention is timely; (2) the applicant has an interest in the subject matter of the action; (3) the disposition of the action may practically impair or impede the applicant's ability to protect its interest; and (4) the existing parties cannot adequately represent the applicant's interests. RCFC

24(a); *Chippewa Cree Tribe of Rocky Boy's Reservation v. United States*, 85 Fed. Cl. 646, 654 (2009); *Am. Renovation & Const. Com. v. United States*, 65 Fed. Cl. 254, 257 (2005).

The Federal Circuit Court's Opinion conflicts with its earlier decision in *Am. Mar. Transp., Inc. v. United States*, 870 F.2d 1559 (Fed. Cir. 1989). In *Am. Mar.*, the Court conducted a thorough review of the factors and requirements for evaluating a Rule 24(a)(2) Motion to Intervene. The Court therein emphasized that the evaluation required that:

These four requirements are to be construed in favor of allowing intervention.

*Am. Mar.*, 870 F.2d at 1561.

The Federal Circuit Court has previously acknowledged that it has yet to determine the appropriate standard of review for intervention motions. *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318 (Fed. Cir. 2007). Regardless, the Federal Circuit Court affirmed the Court of Federal Claims' decision rejecting Kinghorn and Huff's Motion to Intervene.

The inequity and prejudice resulting from applying the wrong standard of review in evaluating intervention motions is highlighted by the inequitable and wrongful denial of Kinghorn and Huff's Motion to Intervene. Given the direct rights impacted by a denial of a Motion to Intervene, the appellate courts should apply a *de novo* standard of review to allow the courts to evaluate a claim on its merits without deference to the lower court's opinion. The Federal Circuit simply applied an abuse of discretion standard in evaluating only one factor, timeliness without any regard for all the other factors. (App-3-4).

Particularly egregious is the Government's contractual responsibility for this pass-through obligation of over \$7.5 million dollars had already been adjudicated by the January 13, 2009 Second Modified Amended Judgment of the United States District Court for the District of

Colorado and the January 30, 2019 Judgment by the Court of Federal Claims. The Motion to Intervene timely sought a ministerial alteration or amendment to the Court of Federal Claims Judgment to include the unpaid post-Judgment interest within the 28 day period set forth in Rule 59(e), RCFC, to alter or amend the Judgment against the United States.

Denying Kinghorn and Huff's Motion to Intervene as allegedly untimely imposes an inequitable penalty on them for abiding by the earlier decision of the Federal Circuit Court in *Ground Improvement Techniques, Inc. v. United States*, 618 Fed. Appx. 1020 (Fed. Cir. 2015). (App-14-33). In that Opinion, the Federal Circuit Court agreed with the Court of Federal Claims that Kinghorn and Huff's interests were "adequately represented" (App-46) by Three GIT Creditors. (App-23-24).

The Federal Circuit Court's decision that Kinghorn and Huff should have known months before summary judgment was granted that their interests were no longer being represented directly conflicts with the decision in *Ground Improvement Techniques, Inc. v. United States*, 618 Fed. Appx. 1020 (Fed. Cir. 2015). In abiding by the Federal Circuit Court's 2015 decision, Kinghorn and Huff are being punished and their interests completely erased in an inequitable travesty of justice.

A *de novo* standard of review is to prevent the injustice resulting from an expedient and cursory review of the salient facts and circumstances supporting an intervention. In the present case, the Federal Circuit Court applied an abuse of discretion standard in evaluating and misapprehending a single circumstance to inflict an inequitable and unjust forfeiture of over \$7.5 million dollars.

In *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994), the right to intervene is properly considered a legal issue to be reviewed *de novo*. With respect to the timing of a Motion to Intervene, the *Sierra Club* Court emphasized that:

...Determining the timeliness of a motion to intervene entails consideration of four factors: (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977) (citations omitted).

*Sierra Club*, 18 F.3d at 1205

The May 18, 2020 Federal Circuit Court Opinion completely disregards the circumstances and prejudices that should have been evaluated in applying a *de novo* review of the intervention denials. Intervention is designed to prevent and uphold the interests and rights of the movant; not to inflict forfeiture that erases a non-party's interests and rights.

The *Sierra Club* Court also teaches that:

The analysis is contextual; absolute measures of timeliness should be ignored. The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor but rather a guard against prejudicing the original parties by the failure to apply sooner. *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970). Federal courts should allow intervention "where no one would be hurt and greater justice could be attained."

*Sierra Club*, 18 F.3d at 1205



In the present case, by applying an abuse of discretion standard of review, the Court ignored the equities and circumstances that should have been evaluated. Such a casual standard of review has precluded attaining equity and justice for the Petitioners.

**CONCLUSION**

For the foregoing reasons, Kinghorn and Huff respectfully request this Court issue a Writ of Certiorari to review the ruling of the United States Court of Appeals for the Federal Circuit.

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