App. 1

928 F.3d 877
United States Court of Appeals, Tenth Circuit.

KANE COUNTY, UTAH, Plaintiff-Appellee,
and
The State of Utah, Intervenor Plaintiff-Appellee,
v.
UNITED STATES of America, Defendant-Appellee.
Southern Utah Wilderness Alliance;
The Wilderness Society, Movants-Appellants.

No. 18-4122.
|
FILED June 25, 2019

**Appeal from the United States District Court for the District of Utah; (D.C. No. 2:08-CV-00315-CW).**

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Before TYMKOVICH, Chief Judge, EBEL, and PHILLIPS, Circuit Judges.

**Opinion**

PHILLIPS, Circuit Judge.

This case comes to us for a third time. This time, we review SUWA's challenge to the district court's denial of its second motion to intervene. SUWA filed this second motion after we reversed the district court's determinations on the width of rights-of-way on three roadways. Responding to the issues now raised, we conclude that SUWA has standing to intervene as a party defendant; that we review SUWA's second motion to intervene de novo and not for an abuse of discretion; and that SUWA has met all requirements to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's denial of SUWA's second motion to intervene.

## BACKGROUND

In 2008, Kane County sued the United States under the Quiet Title Act, 28 U.S.C. § 2409a, which provides "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). Kane County alleged that it held title to fifteen rights-of-way under Section 8 of the Mining Act of 1866, more commonly known as "Revised Statute (R.S.) 2477." In enacting R.S. 2477, Congress codified "a standing offer of a free right of way over the public domain," allowing the construction of highways over public lands not already "reserved for public uses." *Lindsay Land & Live Stock Co. v. Churnos*, 75 Utah 384, 285 P. 646, 648 (1929) (internal quotations omitted). In 1976, Congress enacted the Federal Land Policy and Management Act, which repealed R.S. 2477, but preserved already-existing rights-of-way. 43 U.S.C. § 1769(a).

Seven months after Kane County filed its complaint, SUWA[1] moved to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Both Kane County and the United States opposed the motion. After a hearing, the district court denied SUWA's motion, concluding that SUWA had no legal interest in the asserted rights-of-way, because

[1] SUWA is a member-based nonprofit dedicated to preserving the wilderness of the Colorado Plateau. The Wilderness Society and the Sierra Club both joined SUWA's motion to intervene.

"the only issue in this case is whether Kane County can establish that it holds title to the roads at issue" and SUWA "does not claim title to th[ese] roads." *Kane Cty., Utah v. United States*, No. 2:08-CV-315, 2009 WL 959804, at *2 (D. Utah Apr. 6, 2009). The court further concluded that even if SUWA did have an interest, it had failed to show that the United States would not adequately represent that interest or that it possessed "any special expertise, experience, or knowledge with respect to the historic use of the roads that would not be available to the United States." *Id.* at *2–3.

In 2009, SUWA appealed, and in March 2010 we affirmed, concluding that "even assuming SUWA has an interest in the quiet title proceedings at issue, SUWA has failed to establish that the United States may not adequately represent SUWA's interest." *Kane Cty., Utah v. United States*, 597 F.3d 1129, 1133 (10th Cir. 2010) ("*Kane County I*"). Specifically, we rejected SUWA's argument that it had shown the United States would not adequately represent SUWA's interest in litigating title, despite SUWA's reliance on its history of adversarial relations with the Bureau of Land Management (BLM) and on the BLM's alleged unwillingness to defend federal control. *Id.* at 1134–35.

We raised the possibility of looking beyond the binary title determination to address the "potential scope of Kane County's purported rights-of-way." *Id.* at 1135. But we ultimately declined to do so after noting that SUWA had not argued in the district court that scope was part of the title determination. *Id.* Further, we noted that SUWA hadn't even raised the issue on

appeal until questioned about it during oral argument. *Id.* Accordingly, we deemed the scope argument waived "for purposes of this appeal." *Id.* We affirmed on grounds that SUWA had "failed to establish, at this stage of the litigation, that the federal government will not adequately protect its interest." *Id.*

In March 2010, soon after we decided *Kane County I*, the district court granted the State of Utah's motion to intervene as of right as a plaintiff. Then, in August 2011, after having "traveled all of the roads at issue with counsel and representatives of the parties during a two-day site visit," the district court held a bench trial on the disputed rights-of-way. *See Kane Cty., Utah (1) v. United States*, No. 2:08-CV-00315, 2013 WL 1180764, at *1 (D. Utah Mar. 20, 2013). At trial, the court heard from twenty-six witnesses and received over one hundred and sixty exhibits. *Kane Cty., Utah v. United States*, 772 F.3d 1205 (10th Cir. 2014). After post-trial briefing, in which SUWA participated as an amicus curiae,[2] the district court issued memorandum decisions concluding that (1) it had subject-matter jurisdiction under the Quiet Title Act over all the disputed roads, and that (2) Kane County and the

[2] The district court allowed SUWA to participate as amicus in a limited capacity. The court denied SUWA's request to address the court during trial, but did accept three of its post-trial briefs (though it limited SUWA to those briefs). And in one of its post-trial memorandum decisions, the district court considered SUWA's jurisdictional arguments. *See Kane Cty., Utah v. United States*, 934 F. Supp. 2d 1344, 1347, 1360–64 (D. Utah 2013), *aff'd in part, rev'd in part and remanded*, 772 F.3d 1205 (10th Cir. 2014).

State of Utah had proved R.S. 2477 rights-of-way on twelve of the fifteen roads or road segments. *Id.* The court also decided the scope—i.e., the reasonable and necessary width based on the pre-1976 use—of the proved rights-of-way. *Id.*

In 2013, the United States and the plaintiffs each filed separate appeals. We summarily denied SUWA's motion to intervene in the cross-appeals. In 2014, we affirmed in part and reversed in part. *Kane Cty.*, 772 F.3d at 1209–25 ("*Kane County II*"). Relevant here, we reversed the district court's scope determination for three of the rights-of-way—Swallow Park Road, North Swag Road, and Skutumpah Road—as well as its decision to allow "unspecified future improvements" on these three rights-of-way, *id.* at 1223–25.[3]

The "scope" of a right-of-way is a question of state law, and under Utah law a right-of-way may be expanded beyond the beaten path where "reasonable and necessary" to safely accommodate the pre-1976 use. *Sierra Club v. Hodel*, 848 F.2d 1068, 1080, 1083 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). In other words, an R.S. 2477 right-of-way in Utah may be widened "as necessary to meet the

[3] Though not at issue here, we also reversed the district court's finding of subject-matter jurisdiction to resolve title over six of the roads, *id.* at 1213–14; affirmed the district court's determination that the limitations period had not yet run on one of the roads, *id.* at 1216–19; and reversed the district court's determination that one of the roads was "reserved for public use" under R.S. 2477, *id.* at 1222.

exigencies of increased travel, at least to the extent of a two-lane road." *Id.* at 1083. This analysis requires the district court to proceed in three steps. First, the court must make the binary determination of whether a right-of-way exists at all. *Id.* Second, the court must determine the pre-1976 uses of the right-of-way. *Id.* And third, the court must decide whether, based on the pre-1976 use, the right-of-way should be widened to meet the exigencies of increased travel. *Id.* To the extent that the right-of-way holder wishes to improve[4] the right-of-way beyond what is reasonable and

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[4] We have distinguished between "routine maintenance, which does not require consultation with the BLM," and "construction of improvements, which does." *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 748–49 (10th Cir. 2005), *as amended on denial of reh'g* (Jan. 6, 2006). "Construction of improvements" includes "the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and other drainage structures, as well as any significant change in the surface composition of the road (*e.g.*, going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any improvement, betterment, or any other change in the nature of the road that may significantly impact Park lands, resources, or values. *Id.* (internal quotations omitted). In contrast, "routine maintenance" "preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage, and keeping drainage features open and operable—essentially preserving the status quo." *Id.* (alterations omitted). "Under this definition, grading or blading a road for the first time would constitute 'construction' and would require advance consultation, though grading or blading a road to preserve the character of the road in accordance with prior practice would not." *Id.*

necessary, however, it must first consult with the BLM. *Id.* at 1084–85.

In its memorandum decision, the district court had concluded that Kane County and the State of Utah had proved 24-foot rights-of-way on Swallow Park and North Swag roads (five-mile stretches of dirt road with a current travel surface of between 10 and 12 feet), and a 66-foot right-of-way on Skutumpah Road (a "major two-lane thoroughfare" stretching thirty three miles with a current travel surface of between 24 and 28 feet). *Kane Cty. II*, 772 F.3d at 1223; *Kane Cty.*, 2013 WL 1180764, at *9. But because the district court had failed to consider the pre-1976 uses of these roads, we remanded for it to redetermine the width of the roadways. *Kane Cty. II*, 772 F.3d at 1223. Specifically, we recognized that while a "road can be 'widened [beyond its pre-1976 boundaries] to meet the exigencies of increased travel,' including where necessary to ensure safety," the reasonableness and necessity of any expansion beyond the pre-1976 right-of-way must be read "'*in the light of traditional uses to which the right-of-way was put.*'" *Id.* (emphasis in original) (quoting *Hodel*, 848 F.2d at 1083).[5]

After remand, the case slowed until September 2017, when the district court entered an order directing the parties to file briefs on the effect of our

[5] Kane County and the State of Utah each unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. *Kane Cty., Utah v. United States*, ___ U.S. ___, 136 S. Ct. 318, 193 L.Ed.2d 228 (2015); *Kane Cty., Utah v. United States*, ___ U.S. ___, 136 S. Ct. 319, 193 L.Ed.2d 228 (2015).

ruling. Ten days later, the parties jointly moved for a four-month stay, stating that they had begun settlement discussions and were "optimistic" that they could "reach agreement regarding the effect of [our] decision" and resolve the remaining issues. Appellant's App. at 38, 110–11. Three days later, the district court granted the motion.[6] About two months after that, SUWA sent a letter to the parties requesting "reasonable advance notice" of any settlement discussions and "an opportunity to attend and participate in such discussions," but received no response. *Id.* at 125, 262–63. About three months after the joint motion was filed, the President of the United States considerably reduced the size of the Grand-Staircase-Escalante National Monument from about 1,700,000 acres to about 838,000 acres.[7] Relevant here, SUWA represented at

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[6] On January 2, 2018, the parties jointly requested and were granted an additional stay of 31 days. The day the second stay expired, Kane County filed a "Supplemental Brief and Request for Further Findings of Fact and Conclusions of Law," asking the court to conduct an additional site inspection. The United States responded, agreeing that further fact-finding was necessary, but asserting that the existing record could be supplemented by lay and expert testimony without a second site visit.

[7] *See* Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument, 2017 WL 5988612, https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-grand-staircase-escalante-national-monument/. This proclamation, along with a proclamation reducing Bears Ears ational Monument from around 1,350,000 acres to about 200,000 acres, were the first diminishments of a national monument in over half a century, and by far the largest in U.S. history. *See* National Park Service, *Monuments List*, https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited June 6, 2019).

oral argument that Swallow Park Road and North Swag Road both lie within the de-established portions of the monument, though the United States asserted that only Swallow Park Road does. About three weeks later, SUWA filed a second motion to intervene,[8] which Kane County, the State of Utah, and the United States all opposed.

Though SUWA styled its 2017 motion as a "Motion to Intervene," the district court treated it as a motion to reconsider its denial of SUWA's 2009 motion to intervene. In deciding the motion, the district court assumed for purposes of argument that the motion was timely, but still denied it on grounds that SUWA had presented nothing to undermine the court's earlier determination that the United States was adequately representing SUWA's interest. In doing so, the district court relied on three bases.

First, rejecting SUWA's argument to the contrary, the district court ruled that determining title necessarily includes determining the scope of the rights-of-way. The district court reasoned that "scope is inherent in the quiet title process because as a practical matter the court cannot quiet title to an undefined property." *Kane Cty., Utah v. United States*, No. 2:08-CV-315, 2018 WL 3999575, at *3 (D. Utah Aug. 21, 2018). Second, the court rejected SUWA's argument that the United States was necessarily representing competing interests, reasoning that

[8] The Wilderness Society joined the second intervention motion, but the Sierra Club did not.

unlike cases involving environmental regulations or resource management, the United States' sole interest here lay in seeking the narrowest width of the roadways. *Id.* Third, the court ruled that the "mere possibility of settlement" did not mean that "the United States would advocate for anything other than retention of the maximum amount of property." *Id.* SUWA timely appealed.

## DISCUSSION

SUWA argues that the district court erred by denying its second motion to intervene. Kane County, the State of Utah, and the United States ("the Appellees") have each filed response briefs in support of the district court's order. Before considering the merits of their arguments, we must consider Kane County's argument that SUWA lacks Article III standing.[9]

### I. Standing

To seek relief in federal court, a party must show constitutional standing. *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). To make this showing, a party must "demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the [challenged conduct], and that the injury will likely be redressed by a favorable decision." *Id.* (internal quotations omitted).

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[9] The Appellees make no prudential-standing arguments.

In *San Juan Cty., Utah v. United States*, another R.S. 2477 case involving SUWA, a majority[10] of our en banc court held that "parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing 'so long as another party with constitutional standing on the same side as the intervenor remains in the case.'" 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) (internal quotations omitted).

But ten years later, the Supreme Court modified our "piggyback standing" rule, holding that an intervenor as of right must "meet the requirements of Article III if the intervenor wishes to pursue relief not requested" by an existing party. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, ___ U.S. ___, 137 S. Ct. 1645, 1648, 198 L.Ed.2d 64 (2017). In that case, the record was ambiguous whether the intervening plaintiff was seeking a different form of relief from the existing plaintiff: a separate award of money damages against the same defendant in its own name. *Id.* at 1651–52. Because "[a]t least one [litigant] must have standing to seek each form of relief requested," the Court remanded for the circuit court to determine whether the intervenor, in fact, sought "additional relief beyond" what the plaintiff requested. *Id.* at 1651.[11]

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[10] Unless we indicate otherwise, every citation to *San Juan County* refers to a portion of Judge Hartz's lead opinion that received seven votes.

[11] The dissent cites *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 913 (10th Cir. 2017), for the proposition that "any party" seeking to intervene must demonstrate its own independent Article III standing. Dissenting Op. at 898–99. But language to

Citing *Town of Chester,*[12] Kane County argues that SUWA cannot simply invoke the United States' Article

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that effect in *Safe Streets* is dicta. *Safe Streets* involved two States (Nebraska and Oklahoma) seeking to intervene as plaintiffs in an action against another State, Colorado. There, we held that we were without *subject matter* jurisdiction to consider the State's intervention motion, because 28 U.S.C. § 1251(a) gave exclusive subject-matter jurisdiction to the United States Supreme Court to resolve disputes between two states. *Id.* at 877, 912. Furthermore, *Safe Streets* relied on *Hollingsworth v. Perry*, 570 U.S. 693, 708, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013), for this dicta about constitutional standing, but *Hollingsworth*, in fact, applied the piggyback standing rule. There, the intervenors had to demonstrate their own standing because they were the *sole parties* to seek an appeal. *Id.* at 702, 708, 133 S.Ct. 2652. Here, the United States remains a party. The dissent also cites *United States v. Colorado & Eastern Railroad Company*, 882 F.3d 1264 (10th Cir. 2018). But again, that case is inapposite because there the would-be intervenor seeking to enforce a consent decree that it was not a party to "could not 'piggyback' on the standing of one of the described parties to the Consent Decree because there was no current case or controversy pending before the court on the part of those parties." *Id.* at 1268. In contrast, there exists a live controversy between the United States and the plaintiffs in this case.

[12] *Town of Chester* involved a plaintiff-side intervenor, but we see no reason not to apply that rule to defendant-side intervenors as well. *See Pennsylvania v. President United States of Am.*, 888 F.3d 52, 57 n.2 (3d Cir. 2018) (holding that a special-interest group seeking to intervene as a defendant to defend a challenged federal law did not need to demonstrate Article III standing, because the group was seeking "the same relief as the federal government," namely, the upholding of the law). In the action before us, the distinction between a plaintiff-side and defendant-side intervenor is unimportant, considering how easily a similar dispute could have been presented at the federal government's initiative as a plaintiff. *See e.g.*, *Kane Cty.*, 934 F. Supp. 2d at 1363 (noting that, before Kane County brought this quiet-title action, the BLM had sued Kane County for trespass regarding the same roads at issue here).

III standing, contending that SUWA and the United States are pursuing different relief. We disagree with that view. After all, the United States has informed us that it seeks "retention of the maximum amount of property" and will argue for "the smallest widths [it] can based on the historical evidence," the same relief that SUWA seeks.[13] *See* United States' Resp. Br. at 22, 32; Oral Arg., at 18:30.

Moreover, even if SUWA needed to establish its own independent standing, it has done so. Article III standing requires a litigant to show: (1) an injury in fact that is (a) concrete and particularized and (b)

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[13] Contrary to the dissent's view, *see* Dissenting Op. at 898, the interests of the United States and SUWA are not necessarily identical under Rule 24(a)(2) just because they pursue the same form of relief for piggyback standing under *Town of Chester*. *See e.g.*, *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (concluding that interests were not identical even though both the government and the intervenor sought to uphold the Mexican Spotted Owl's protection); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) (concluding that interests were not identical even though the government and the intervenor both sought to uphold the proclamation creating a national monument). To hold otherwise would leave movants who pursued the same form of relief as the representative party *per se* adequately represented under Rule 24(a)(2) and thus denied intervention under *Town of Chester*. *See Pennsylvania v. President United States of Am.*, 888 F.3d 52, 57 n.2, 60–62 (3d Cir. 2018) (finding inadequate representation where the intervenors pursued the same relief as the party with standing under *Town of Chester*); *Doe v. Zucker*, No. 117CV1005GTSCFH, 2019 WL 111020, at *10, *12 (N.D.N.Y. Jan. 4, 2019) (same) ("Even though Respondents and Intervener-Respondents seek the same ultimate relief [under *Town of Chester*], their interests remain different enough that Respondents might not adequately represent their unique interests.").

actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury can likely be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

Here, as in *San Juan County*, it is "indisputable that SUWA's environmental concern is a legally protectable interest." *See* 503 F.3d at 1199. To prove an injury in fact, SUWA must establish an actual or imminent impairment of that interest. Imminence is "a somewhat elastic concept," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and "[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (internal quotations omitted).

Under this standard, we conclude that SUWA has established an imminent injury. Kane County and the State of Utah seek to double the width of Swallow Park and North Swag roads, which are both dirt roads, and to more than double the width of Skutumpah Road. Wider roads will likely require realignments or improvements, such as grading or paving. *See generally, Hodel*, 848 F.2d at 1084–86; *Kane Cty.*, 2013 WL 1180764. Such widening and improvement of the roads in a scenic area would almost inevitably increase traffic, diminishing the enjoyment of the nearby natural wilderness. *See Hodel*, 848 F.2d at 1092 (noting

that a project involving "realignments, widening, . . . [and] a significant improvement in the quality of the road surface" would accommodate "large increases in future traffic" on the road); *S. Utah Wilderness All.*, 425 F.3d at 748 (noting that improvements may "change the character of the roadway").

Nor is such an injury speculative. An injury may be imminent even though contingent upon an unfavorable outcome in litigation. *See Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1299 (10th Cir. 2008) (concluding that "[t]he consequences of a contingent liability . . . may well be actual or imminent" even though "by definition [such liability] may not arise for a considerable time, if ever"). In *San Juan County*, we recognized that "if the County prevails, it will then pursue opening the road to vehicular traffic that SUWA has been trying to prevent." 503 F.3d at 1200. For that reason, we saw "nothing speculative about the impact on SUWA's interests if the County prevails in its quiet-title action," noting that "the whole point of" Kane County's suit was to increase traffic on the roads.[14] *Id.* at 1201–02. We acknowledge that *San Juan*

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[14] Though this portion of the opinion concerned the potential impairment of SUWA's interests under Rule 24(a)(2), other courts have recognized that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *see also Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) ("Any interest of such magnitude as to support Rule 24(a) intervention of right is sufficient to satisfy the Article III standing requirement as well.") (internal quotations and alterations omitted).

*County* involved the possibility of reopening closed roads, as opposed to widening already-opened roads, as here—but we view both as sufficient degrees of impact. A 24-foot road allows more traffic than a 10- or 12-foot road (in the case of North Swag and Swallow Park roads), and a 66-foot road allows more traffic than a 24- to 28-foot road (in the case of Skutumpah Road). And the more traffic, the more of an impact on the natural wilderness. Therefore, even assuming SUWA were required to establish its own Article III standing, we conclude that it has done so. *See Laidlaw*, 528 U.S. at 180–81, 120 S.Ct. 693.

## II. Standard of Review

Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, a non-party seeking to intervene as of right must establish (1) timeliness, (2) an interest relating to the property or transaction that is the subject of the action, (3) the potential impairment of that interest, and (4) inadequate representation by existing parties. *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017). We review a district court's timeliness ruling for an abuse of discretion, unless the district court makes no findings on timeliness; in that case, we review de novo. *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001). And, at least for initial motions to intervene, we review the district court's rulings on the other three prongs de novo. *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996).

SUWA filed its second motion to intervene nine years after filing its first.[15] SUWA argues that the district court erred in treating its second motion as one for reconsideration of its denial of the first motion to intervene. Instead, SUWA says, we should review de novo, because it did "not ask the Court to second guess its prior ruling or review previously existing but newly discovered facts," but rather to consider "a new political and legal landscape that did not exist when SUWA moved to intervene a decade ago." SUWA's Opening Br. at 12 n.47. In contrast, the Appellees argue that this court should treat SUWA's second motion as a mere request to reconsider the denial of its 2008 motion to intervene. From this, they argue that the proper standard of review is for an abuse of discretion. *See United States v. Huff*, 782 F.3d 1221, 1224 (10th Cir. 2015) ("We review a district court's decision whether to reconsider a prior ruling for abuse of discretion.").

We agree with SUWA. Though our court has never determined what standard of review applies to a successive motion to intervene, we conclude that de novo review is more appropriate when, as here, a proposed intervenor shows that circumstances have changed between the two motions to intervene.

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[15] Kane County represents that this is SUWA's "fifth attempt" to intervene in this case. *See* Kane Cty.'s Resp. Br. at 1. To reach this figure, Kane County includes SUWA's appeal of the 2008 denial, SUWA's attempt to intervene in the *Kane County II* appeal, and SUWA's current appeal. We reject such a broad characterization.

In *City of Colorado Springs v. Climax Molybdenum Co.*, a movant had filed three motions to intervene over a nearly-fifty-year span. 587 F.3d 1071, 1077 (10th Cir. 2009). Though we ultimately decided the case on standing grounds, we stated that "[i]f we reach the merits of Climax's appeal, our review of the district court's denial of the motion to intervene as of right will be *de novo*." *Id.* at 1078.[16]

In addition, other cases in our circuit point us to de novo review here. In *San Juan County*, seven judges acknowledged that case developments can alter the intervention calculus. In the lead opinion, Judge Hartz, joined by two other judges, stated that the "denial [of a motion to intervene] does not forever foreclose" intervention and that "the matter may be revisited" if "developments after the original application for intervention undermine" the basis for the initial denial. *San Juan Cty.*, 503 F.3d at 1207 (opinion of Hartz, J.). In addition, Judge Ebel, joined by three other judges, stated "I recognize, and appreciate the [lead opinion's] recognition that SUWA may renew its motion to

[16] We note that the dissent's cited cases on this point, *Abeyta v. City of Albuquerque*, 664 F.3d 792, 796 (10th Cir. 2011), and *Plain v. Murphy Family Farms*, 296 F.3d 975, 978 975, 978 (10th Cir. 2002), contain stray comments characterizing a successive motion for intervention as a motion to reconsider. *See* Dissenting Op. at 901–02. But neither case involved an appeal of the denial of an intervention motion. Rather, both cases conclude that a nonparty cannot appeal an adverse judgment unless "the nonparty has a unique interest in the litigation and becomes involved in the resolution of that interest in a timely fashion both at the district court level and on appeal." *Abeyta*, 664 F.3d at 796 (citing *Plain*, 296 F.3d at 978).

intervene at a later date if it can demonstrate more clearly a conflict between its interests and the conduct of the United States in this or subsequent litigation." *Id.* at 1227 (Ebel, J., concurring in part, and dissenting in part). By emphasizing the possibility of changed circumstances, we view the seven judges as recognizing the importance of another round of review. We see no sense in blocking ourselves from the same de novo review we give the initial motion to intervene—when things have so changed.[17] Significantly, our statement in *Kane County I* also emphasizes a need to reevaluate intervention when circumstances change.[18] *See Kane Cty. I*, 597 F.3d at 1135 ("[SUWA] has failed to establish, *at this stage of the litigation*, that the federal government will not adequately protect its interest.") (emphasis added).

## III. SUWA is entitled to intervene as of right.

As previously noted, to intervene as of right SUWA must establish that (1) the application is timely; (2) it

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[17] We discuss these developments later in Part III.C addressing adequate representation. In short, we consider a district court's moving from the binary title question to the more nuanced scope question as a qualifying development, as well as the change in presidential administration and its recent efforts to settle. *See Zinke*, 877 F.3d at 1169 ("[T]he change in the Administration raises the possibility of divergence of interest or a shift during litigation.") (internal quotations omitted).

[18] Indeed, during oral argument in *Kane County I*, the panel explored whether SUWA's interests might not arise until after title had been decided in favor of Kane County or the State of Utah.

claims an interest relating to the property or transaction which is the subject of the action; (3) the interest may as a practical matter be impaired or impeded; and (4) the interest may not be adequately represented by existing parties. *Zinke*, 877 F.3d at 1164. "This court has historically taken a liberal approach to intervention and thus favors the granting of motions to intervene." *Id.* (internal quotations omitted). In addition, "the requirements for intervention may be relaxed in cases raising significant public interests." *San Juan Cty.*, 503 F.3d at 1201 (citing *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 136, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967)). We now consider each prong in turn.

**A. SUWA's motion is timely.**

Kane County argues that SUWA's motion is untimely. "The timeliness of a motion to intervene is assessed 'in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.'" *Utah Ass'n of Ctys.*, 255 F.3d at 1250 (quoting *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984)). "[D]elay in itself does not make a request for intervention untimely." *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1235 (10th Cir. 2010). "The other factors in the test for untimeliness must also be considered." *Id.*

Reviewing de novo,[19] we conclude that SUWA's motion is timely. First, SUWA filed the motion three months after the parties' joint motion to stay. *See Zinke*, 877 F.3d at 1164–65 (holding that the motion was timely where the intervenors moved to intervene "just over two months after" learning of the lawsuit that could potentially affect their interests). Second, the only prejudice the Appellees allege is that "having to respond to excess briefs" will "needlessly delay the proceedings." Kane Cty. Resp. Br. at 9. Even assuming this could suffice to show prejudice, our court requires that "the prejudice to other parties . . . be prejudice caused by the movant's delay, not by the mere fact of intervention." *Tyson Foods*, 619 F.3d at 1236. Here, Kane County alleges prejudice just from the fact of intervention. *See id.* SUWA's participation will be limited to litigating the scope of three roads, and there has been no substantive briefing on this issue since the remand, so we fail to see how allowing SUWA to intervene at this stage would prejudice the Appellees. *See San Juan Cty.*, 503 F.3d at 1174 ("[T]he intervention of SUWA would not expose the United States to any burden not inherent in the litigation to which it has consented in the Quiet Title Act."). Therefore, because no "unusual circumstances" lead us to believe otherwise, we conclude that SUWA's motion is timely. *See Utah Ass'n of Ctys.*, 255 F.3d at 1250.

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[19] We review the timeliness prong de novo because the district court made no timeliness findings. *See Utah Ass'n of Ctys.*, 255 F.3d at 1249.

### B. SUWA possesses an interest that may be impaired by the litigation.

To meet the interest requirement, an applicant "must have an interest that could be adversely affected by the litigation." *San Juan Cty.*, 503 F.3d at 1199. We apply "practical judgment" when "determining whether the strength of the interest and the potential risk of injury to that interest justify intervention."[20] *Id.* Establishing the potential impairment of such an interest "presents a minimal burden," *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010), and such an impairment may be "contingent upon the outcome of [] litigation," *San Juan Cty.*, 503 F.3d at 1203 (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995)). For example, we have concluded that a commercial wildlife photographer who had "photographed and studied the [Mexican Spotted] Owl in the wild" and had been instrumental in the decision to list the Owl under the Endangered Species Act possessed a legal interest in defending against a lawsuit to rescind that protection. *Coal. of Ariz./N.M. Ctys.*, 100 F.3d at 839–43.

In *San Juan County*, we concluded that it was "indisputable that SUWA's environmental concern is a legally protectable interest." 503 F.3d at 1199. But in the present case, the district court declined to revisit its 2009 ruling that SUWA possesses no legal interest in the case. In that decision, the district court had

[20] Though our court used to require an interest to be "direct, substantial, and legally protectable," we abandoned that test in *San Juan County*, finding it "problematic." 503 F.3d at 1192.

reasoned that (1) "unlike the roads at issue in *San Juan County*, the roads at issue here have been open to the public for many years," and (2) "the only issue in this case is whether Kane County can establish that it holds title to the roads at issue." *Kane Cty.*, 2009 WL 959804, at *2. These rationales are not persuasive.

First, as mentioned previously, we view the difference in impacts between opening closed roads and widening already-opened roads as one of degree. Wider roads attract more traffic, which would impair SUWA's interest in preservation and enjoyment of the surrounding land. Second, a majority of our court recognized in *San Juan County* that although "SUWA d[id] not claim that it ha[d] title" to the disputed right-of-way, Rule 24(a)(2) "requires only that the applicant for intervention 'claim an interest *relating to* the property or transaction which is the subject of the action.'" 503 F.3d at 1200 (alteration omitted) (emphasis in original) (quoting Fed. R. Civ. P. 24(a)(2)). Given SUWA's decades-long history of advocating for the protection of these federal public lands, and the plaintiffs' stated objective of widening these roads, we conclude that SUWA has an interest that may be impaired by the litigation. *See id.* at 1201; *Coal. of Ariz./N.M. Ctys.*, 100 F.3d at 838–41; *Utah Ass'n of Ctys.*, 255 F.3d at 1252.

### C. The United States may not adequately represent SUWA's interest.

Next, SUWA must show that existing parties may not adequately represent its interest. This burden is "minimal," and "it is enough to show that the representation 'may be' inadequate." *Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978) (quoting *Trbovich v. United Mine Wkers.*, 404 U.S. 528, 538 n.10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)). "Of course, representation is not inadequate simply because the applicant and the representative disagree regarding the facts or law of the case." *Sanguine*, 736 F.2d at 1419. "Nor is representation inadequate merely because the representative enters into a [settlement], because any case, even the most vigorously defended, may culminate in a [settlement]." *Id.* (internal quotations omitted).

When a would-be intervenor's and the representative party's interests are "identical," we presume adequate representation. *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986); *see also Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1113–14 (10th Cir. 2017) ("When the applicant and an existing party share an identical legal objective, we presume that the party's representation is adequate."). But where the purportedly adequate representative of the proposed intervenor's interest is a governmental entity, "this presumption [can be] rebutted by the fact that the public interest the government is obligated to represent may differ from the would-be intervenor's

particular interest." *Utah Ass'n of Ctys.*, 255 F.3d at 1255.

Illustrative is *WildEarth Guardians v. United States Forest Service*, a case in which we allowed a coal company to intervene over an environmental group's opposition. 573 F.3d 992, 994–97 (10th Cir. 2009). The environmental group had argued that the United States and the coal company both advocated for affirming an agency's decision to allow venting of methane gas from a mine. *Id.* at 994, 996. From this shared objective, the environmental group argued that the government adequately represented the company's interest. *Id.* We allowed intervention, noting that "the government has multiple objectives and could well decide to embrace some of the environmental goals" that the company opposed. *Id.* at 997. Also illustrative is *Utah Association of Counties*, where we allowed an environmental group to intervene as of right in a suit challenging the legality of the creation of the Grand Staircase-Escalante National Monument. 255 F.3d at 1255–56. There, the Utah Association of Counties opposed intervention, arguing that the government and the environmental group shared identical interests in sustaining the monument. *Id.* We rejected this argument, explaining that "[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *Id.* at 1256. The reasoning of these cases supports SUWA's intervention in the present case.

Here, the parties agree that the only remaining issue in the district court is the scope of three roads. In deciding scope, the district court must determine whether it is reasonable and necessary to widen the roads to "meet the exigencies of increased travel . . . in the light of traditional uses to which the right-of-way was put." *Kane Cty. II*, 772 F.3d at 1223 (emphasis omitted) (quoting *Hodel*, 848 F.2d at 1083). SUWA wants the narrowest roads allowed. We must decide whether SUWA has met its minimal burden of establishing that the United States may not adequately represent this interest.

Relying on the above cases, SUWA first argues that its interests are not identical to those of the United States. In that circumstance, we do not apply a presumption of adequate representation. More specifically, SUWA points to the broader interests the United States must consider beyond seeking the narrowest scope of the rights-of-way.

In addition, as it did in the district court, SUWA argues that unlike a title determination, the scope issues in the district court are not a binary choice. Indeed, the title issues—Kane County's and the State of Utah's rights-of-way—are now established, and not contested on appeal. Instead, the intervenors seek to participate in the limited issue on which we remanded—the scope of the three remaining roads. In contrast, the Appellees contend that the United States' interests are identical to SUWA's, arguing that this is merely a "case about title," and that the United States' only interest is to advocate for the narrowest scope of

the roads. United States' Resp. Br. at 13–14, 17–19, 21, 31, 38; State of Utah's Resp. Br. at 12–16. We agree with SUWA.

In *San Juan County*, four judges expressly viewed title and scope as separate determinations, observing that the question of title is a "binary" determination, while scope is much more "nuanced." 503 F.3d at 1228 (Ebel, J., concurring in part, and dissenting in part). We now adopt this reasoning. We read the lead opinion the same way, as it noted that the United States' single objective was to defend "exclusive title."[21] *See id.* at 1206 (Opinion of Hartz, J.); *see also id.* at 1228 (Ebel, J., concurring in part, and dissenting in part) (quoting lead opinion that "[s]hould it be determined that the State or the County does hold a valid R.S. 2477 right of way, the closure of Salt Creek Road to vehicular traffic will be revisited *to insure that it is consistent with the rights associated with such a right-of-way*") (alterations omitted) (emphasis in original).

We agree with the district court that "scope is inherent in the quiet title process." *Kane Cty.*, 2018 WL 3999575, at *3. After all, a right-of-way must have a scope. But the district court must determine title and scope in separate steps. The district court itself recognized this in its 2011 summary-judgment order quieting title on many of the roads, while "reserv[ing] for trial the scope of the rights-of-way." *See Kane Cty.*, 2013 WL 1180764, at *3. Similarly, in *Kane County II*,

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[21] Neither Judge Kelly's nor Judge McConnell's concurrence takes a position on the question of scope.

we remanded for the district court to re-examine the scope of three rights-of-way, leaving its title determination on those rights-of-way undisturbed. *Kane Cty. II*, 772 F.3d at 1225. In other words, even upon deciding the R.S. 2477 title issue on the rights-of-way, the district court still needed to decide under Utah law whether Kane County and the State of Utah were entitled to widen the scope of the rights-of-way beyond the beaten path existing before October 21, 1976, when R.S. 2477 was repealed. *See Hodel*, 848 F.2d at 1083. As more fully explained below, though SUWA and the United States had identical interests in the title determination, they do not on scope.

For a proposed intervenor to establish inadequate representation by a representative party, "the possibility of divergence of interest need not be great," *Nat. Res. Def. Council*, 578 F.2d at 1346, and this showing "is easily made" when the representative party is the government, *Utah Ass'n of Ctys.*, 255 F.3d at 1254. SUWA's goal is to limit as much as possible the number of vehicles on the roads, but the United States' objectives "involve a much broader range of interests, including competing policy, economic, political, legal, and environmental factors."[22] *See San Juan Cty.*, 503

[22] The Appellees argue that SUWA waived this argument, citing to our decision in *Kane County I*. But we merely deemed the argument waived "for purposes of th[at] appeal." *Kane Cty. I*, 597 F.3d at 1135. This is a new appeal. Scope was not yet at issue in *Kane County I*, because title was yet to be decided. Moreover, unlike nine years ago, when SUWA first raised scope "upon questioning at oral argument," *see id.*, the Appellees have now been afforded a full opportunity to brief the issue in this appeal.

F.3d at 1229 (Ebel, J., concurring in part, and dissenting in part) (citing 16 U.S.C. §§ 1, 1a-1, 271d). The Appellees contend that this is merely a case about property rights. But when that property is public land, public interests are involved. *See Block*, 461 U.S. at 284–85, 290, 103 S.Ct. 1811 (noting that the Quiet Title Act "was necessary for protection of national public interests"). And "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Ctys.*, 255 F.3d at 1255–56. Indeed, "[w]e have repeatedly pointed out that in such a situation the government's prospective task of protecting 'not only the interest of the public but also the private interest of the petitioners in intervention' is 'on its face impossible' and creates the kind of conflict that 'satisfies the minimal burden of showing inadequacy of representation.'" *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002) (quoting *Nat'l Farm Lines v. I.C.C.*, 564 F.2d 381, 384 (10th Cir. 1977)).

SUWA is focused on pursuing the narrowest scope, but many of the stakeholders involved may want wider

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*See Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 838 (10th Cir. 2014) (exercising our discretion to consider a waived issue because the parties had an opportunity to brief the issue and because it was "sufficiently substantial and important to demand our attention"). We thus see no unfairness to the Appellees in considering this "substantial and important" issue. *See id.*

roads. The United States represents these broad-ranging and competing interests, too. *See San Juan Cty.*, 503 F.3d at 1230 (Ebel, J., concurring in part, and dissenting in part) ("[E]ven in this quiet title action, the United States is representing multiple interests."). Indeed, even if the United States is advocating "as well as can be expected" for the narrowest scope of the roads, its conflicting interests render its representation inadequate. *See Trbovich*, 404 U.S. at 538–39, 92 S.Ct. 630 (finding the Secretary of Labor to be an inadequate representative of a union member who sought to set aside the results of a union-officer election, because the Secretary had a statutory "duty to serve two distinct interests, which are related, but not identical"); *see also Zinke*, 877 F.3d at 1168 ("[T]he government cannot adequately represent the interests of a private intervenor *and* the interests of the public.") (emphasis in original); *Coal. of Ariz./N.M. Ctys.*, 100 F.3d at 845 ("[The government] must represent the public interest, which may differ from [the intervenor's] particular interest."); *WildEarth Guardians*, 573 F.3d at 997 (noting that the "government ha[d] multiple objectives and could well decide to embrace" some goals that the intervenor opposed).

In addition to the public interest, the United States must consider internal interests, such as the efficient administration of its own litigation resources. When pressed at oral argument about whether it was seeking a reviewable judicial order in this case, the United States responded that it "ha[s] 12,000 of these claims statewide" and is "interested in trying to resolve

them as quickly and efficiently as [it] can," *see* Oral Argument at 24:30, an interest that SUWA certainly doesn't share.[23] Moreover, the United States opposes SUWA's intervention motion—further indicating that it may not adequately represent SUWA's interests here. *See San Juan Cty.*, 503 F.3d at 1230 (Ebel, J., concurring in part, and dissenting in part) ("[T]he fact that the United States has opposed SUWA's intervention in this action suggests that the United States does not intend fully to represent SUWA's interests."); *cf. WildEarth Guardians*, 573 F.3d at 997 (finding inadequate representation, in part, because the representative party, while taking no position on intervention, objected to the idea that it be required to "coordinate filings with" the intervenor); *Utah Ass'n of Ctys.*, 255 F.3d at 1256 ("The government has taken no position on the motion to intervene in this case. Its silence on any intent to defend the intervenors' special interests is deafening.") (internal quotations and alterations omitted).

Given these conflicting interests, we conclude that SUWA's and the United States' interests are not identical. *See Utah Ass'n of Ctys.*, 255 F.3d at 1255. Therefore, no presumption of adequate representation applies. *See id.*

Moreover, even if such a presumption were to apply, we would conclude that SUWA has rebutted it.

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[23] An order approving a settlement agreement would be reviewable only for an abuse of discretion. *United States v. Hardage*, 982 F.2d 1491, 1495 (10th Cir. 1993).

Our court has recognized that a "change in [presidential a]dministration raises 'the possibility of divergence of interest' or a 'shift' during litigation." *Zinke*, 877 F.3d at 1169 (quoting *WildEarth Guardians*, 573 F.3d at 996–97). Here, the first significant docket activity after the new administration came into office was a motion in September 2017 to stay the case to allow settlement discussions to resolve the remaining issues. Though settlement negotiations, standing alone, are not dispositive, *see Sanguine*, 736 F.2d at 1419, the circumstances here suffice to satisfy the minimal burden to show inadequate representation. We rendered our decision in 2014 and issued the mandate in February 2015, yet, the United States showed no willingness to settle the case until two and half years later, or six months after the new administration inherited the litigation. *See E.P.A. v. City of Green Forest, Ark.*, 921 F.2d 1394, 1401 (8th Cir. 1990) (reversing the denial of a second motion to intervene because "[a]lthough the [movants] had expressed concerns about possible settlement sixteen months earlier, the settlement possibility [at that time] was merely inchoate"). The United States points to its past litigation conduct in this case, such as its successful appeal in *Kane County II*, as evidence that it has no intention of "capitulat[ing]." United States' Resp. Br. at 9, 15, 24, 26–27, 32. But the *Kane County II* appeal was litigated by the previous administration. *See Utah Ass'n of Ctys.*, 255 F.3d at 1256 (noting that "the government's past conduct" in litigation is not strong evidence of adequacy because "it is not realistic to assume that the agency's programs will remain static

or unaffected by unanticipated policy shifts") (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998)). Moreover, SUWA cites statements from parties involved in the litigation that further support the notion that the new administration may be more inclined to settle.[24]

Significantly, although SUWA will not be entitled to veto any settlement agreement between the United States and the plaintiffs, *see Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), any settlement will require court approval. *See* Fed. R. Civ. P. 41(a) (after an "opposing party serves either an answer or a motion for summary judgment," the action may be dismissed "only by court order, on terms that the court considers proper"); *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991) ("[T]he district court must ensure that the agreement is not illegal, a product of collusion, or against the public interest.").

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[24] SUWA cites a State of Utah attorney's testimony before a legislative committee in 2014, stating that "the federal government has taken the position that the only way we get an R.S. 2477 road is if a court orders it." *See* Utah State Legislature, Meeting of the Natural Resources, Agricultural, and Environmental Quality Appropriations Subcommittee, *Public Lands Office: RS 2477 Efforts and Results* (Sept. 18, 2014), available at http://utahlegislature.granicus.com/MediaPlayer.php?view_id=2&clip_id=17764. Consistent with this testimony, SUWA also cites a memo from a regional BLM director to the Acting BLM Solicitor, which states that although settlement negotiations with the previous administration had "broke[n] down," the parties agreed in April 2017 "to begin a dialogue to explore potential resolutions to the R.S. 2477 issue[s in Utah] under th[e new] administration." Appellant's App. vol. 1 at 133–34, 292–93.

And SUWA will be "entitled to present evidence and have its objections heard at the hearings on whether to approve" such a settlement. *See City of Cleveland*, 478 U.S. at 529, 106 S.Ct. 3063. As an amicus, SUWA would have no such rights.

In conclusion, given our court's "relaxed" intervention requirements in "cases raising significant public interests" such as this one, *see San Juan Cty.*, 503 F.3d at 1201, and our "liberal approach to intervention," *see Zinke*, 877 F.3d at 1164, we hold that SUWA has satisfied its "minimal" burden of showing that the United States may not adequately represent its interests,[25] *see Nat. Res. Def. Council*, 578 F.2d at 1345.

## CONCLUSION

Consistent with this opinion, we reverse the district court's denial of SUWA's motion to intervene.

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[25] SUWA also argues that the administration's decision to reduce by half the Grand Staircase-Escalante National Monument presents a basis to disbelieve that the United States will, in fact, fight for the narrowest scope of the roads. As SUWA sees it, if the administration is willing to rescind protections of a vast expanse of land in the same area as the roads at issue, one could reasonably infer that it may not vigorously fight for the smallest scope of the roads. Because we find that SUWA has met its burden without this evidence, we need not address this argument.

TYMKOVICH, Chief Judge, dissenting.

Kane County and the State of Utah are engaged in protracted litigation against the United States under the Quiet Title Act. In 2008, the district court denied the Southern Utah Wilderness Alliance's first attempt to intervene as of right under Federal Rule of Civil Procedure 24(a), and this court affirmed that judgment on appeal in 2010, finding the United States adequately represented SUWA's purported interest. *See Kane Cty. v. United States*, 597 F.3d 1129 (10th Cir. 2010) (*Kane Cty. I*).

Today, however, this court reaches the opposite conclusion. I respectfully dissent. In my view, SUWA has not demonstrated a concrete injury giving it standing to pursue a claim in federal court, nor can it meet the requirements for mandatory intervention under Rule 24.

I will first address our jurisdiction and explain why I believe SUWA lacks standing to intervene, both under Article III and under the third-party standing doctrine. Then I will explain why, even if SUWA has standing, the district court applied the correct standard of review and did not err in denying intervention.

### *A. Jurisdiction*

"Standing is a threshold issue in every case before a federal court." *Phila. Indem. Ins. Co. v. Lexington Ins. Co.*, 845 F.3d 1330, 1334 (10th Cir. 2017). Our

precedent is clear that a prospective intervenor must possess Article III standing. *United States v. Colo. & E. R.R. Co.*, 882 F.3d 1264, 1269 (10th Cir. 2018); *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 913 (10th Cir. 2017); *see also Town of Chester v. Laroe Estates, Inc.*, ___ U.S. ___, 137 S. Ct. 1645, 1651, 198 L.Ed.2d 64 (2017); *Hollingsworth v. Perry*, 570 U.S. 693, 704, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013).

Ensuring that every party before a federal court possesses standing is essential because of the doctrine's underpinnings in Article III of the Constitution, which confines federal courts to adjudicating "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. The doctrine also reflects "the separation-of-powers principles underlying that limitation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 1386, 188 L.Ed.2d 392 (2014). Entertaining parties that lack standing effectively disregards the constitutional limits that circumscribe the power of federal courts. This is because "an Article III case or controversy joined by an intervenor who lacks standing ceases to be an Article III case or controversy." *See N. Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 920 (8th Cir. 2015).

In prior cases involving SUWA, our circuit concluded that SUWA and other "parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case." *San Juan Cty. v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc)

(internal quotation marks omitted). But *San Juan County*'s "piggyback standing" rule has since been abrogated. In 2013, the Supreme Court held that "*any person* invoking the power of a federal court must demonstrate standing to do so," *Hollingsworth*, 570 U.S. at 704, 133 S.Ct. 2652 (emphasis added), and affirmed that a prerequisite to "intervene[] to defend" one's interest is "to assert an injury in fact of his own," *id.* at 708, 133 S.Ct. 2652. Three years later, the Supreme Court unanimously affirmed "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester*, 137 S. Ct. at 1651.

The majority opinion here says SUWA seeks relief identical to the United States because the government has committed to "retention of the maximum amount of property" and will argue for "the smallest widths [it] can based on the historical evidence." *See* op. at 887. But this finding conflicts with the majority's later conclusion that the United States may not adequately represent SUWA's interests because "SUWA's and the United States' interests are not identical," *id.* at 895, with respect to the scope of Kane County's asserted rights-of-way. *See also id.* at 895 ("SUWA is focused on pursuing the narrowest scope [of road width], but many of the stakeholders involved may want wider roads. The Unites States represents these broad-ranging and competing interests, too."). If SUWA seeks identical relief to the United States—that is, federal retention of the maximum amount of property—then

the United States provides adequate representation of SUWA's interests, as we acknowledged in *Kane County I*. If SUWA seeks relief different from the United States—because the government does not, in fact, wish to retain maximum property—then SUWA must demonstrate that it possess standing according to *Town of Chester*.[1]

This circuit has recognized the Supreme Court's abrogation of *San Juan County*'s piggyback rule for intervenor standing in several published opinions, regardless of whether the remedy sought is identical. In *Safe Streets Alliance*, we affirmed that "Rule 24(a)'s provisions cannot remove the Article III hurdle that anyone faces when voluntarily seeking to enter a federal court." 859 F.3d at 912. We also recognized "[t]he Supreme Court has held, moreover, that Article III's requirements apply to *all* intervenors, whether they intervene to assert a claim or defend an interest." *Id.* (emphasis added). We reaffirmed that principle again last year: "*Any* party, whether original or intervening, that seeks relief from a federal court must

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[1] Perhaps the tension in the majority opinion might dissipate if this were a case in which the government had to balance various private and public interests. But because a Quiet Title Act suit is not such a dispute, the situation here is unlike *Pennsylvania v. President United States of America*, 888 F.3d 52, 59 (3d Cir. 2018), or the other Administrative Procedure Act cases cited by the majority. This is explained in greater detail in Section B.2. In fact, the present suit resembles the case *President* distinguished, in which the proposed intervenor "share[d] the same objective as the United States" and "[a]ny differences" were "merely differences in strategy." *United States v. Territory of the Virgin Islands*, 748 F.3d 514, 522 (3d Cir. 2014).

have standing to pursue its claims." *United States v. Colo. & E. R.R. Co.*, 882 F.3d 1264, 1269 (10th Cir. 2018) (quoting *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1078 (10th Cir. 2009)) (emphasis added).

Despite SUWA's assertions to the contrary, our precedent shows SUWA must demonstrate it possesses independent Article III standing to intervene in this litigation. Nevertheless, the majority opines that SUWA need not establish independent standing so long as the United States remains a party. This conclusion is, in my view, a return to the abrogated reasoning of *San Juan County* in violation of clear, binding precedent.

The majority goes on to say that, in any case, SUWA *has* established standing. Our Article III and third-party standing doctrines indicate otherwise.

### *1. Constitutional Standing*

To establish Article III standing, an intervenor must first demonstrate "an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (cleaned up). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party

not before the court." *Id.* (cleaned up). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Id.* at 561, 112 S.Ct. 2130 (some internal quotation marks omitted).

An organization such as SUWA may assert associational standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Collins v. Daniels*, 916 F.3d 1302, 1312 (10th Cir. 2019).

SUWA asserts its environmental concern is "a legally protectable interest" for purposes of Article III standing. *San Juan Cty.*, 503 F.3d at 1199. SUWA reasons that a wider right-of-way determination would lead Kane County to permit greater vehicular traffic, which in turn would cause a concrete and particularized injury to its environmental interests, and that this injury could be redressed by a successful defense limiting the length and width of the roads.

An injury-in-fact must be both concrete and particularized *and* actual or imminent. The asserted injury cannot merely be speculative, however. The "threatened injury must be *certainly impending* to constitute injury in fact" and "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (cleaned up); *see also Summers v.*

*Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

SUWA is correct that environmental interests, such as "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562–63, 112 S.Ct. 2130; *see also S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1155–56 (10th Cir. 2013) (holding SUWA's environmental interests sufficiently concrete and particularized to challenge drilling leaseholds). But SUWA merely conjectures that (1) the United States will not zealously defend its title to the relevant roads, (2) the title adjudication will thus lead to an appreciably different outcome regarding pre-1976 uses, (3) this appreciable difference will lead Kane County to open the relevant roads to greater vehicular traffic than it would have otherwise, and finally (4) the greater vehicular traffic will, at the margin, cause aesthetic environmental injury to SUWA members who may return to the particular areas in the future.

As was the case in *Clapper*, the path leading to SUWA's asserted injury is too attenuated to establish Article III standing. This chain of events relies on a patchwork of assumptions and possibilities resulting from the decisions of multiple actors, each with its own interests and institutional checks. A proposed party cannot rely on mere "speculation" that its members who have visited the relevant environmental locale "will find their recreation burdened" in the future due to an uncertain chain of events. *Earth Island*, 555 U.S.

at 499, 129 S.Ct. 1142. Similarly, in *Palma* we dismissed SUWA's administrative challenge to BLM drilling permits as unripe for judicial review because "[t]here [was] simply too much uncertainty as to when and what type of drilling, if any, [would] occur on the thirty-nine contested leases." 707 F.3d at 1160.

For these reasons, I would find SUWA's alleged injury is not an imminent injury-in-fact for purposes of Article III standing.

### *2. Third-Party Standing*

Even if SUWA could assert constitutional standing, it would lack standing under the third-party standing doctrine. "[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (internal quotation marks omitted); *see also Collins*, 916 F.3d at 1312–13.

An exception to this rule may apply when "the party asserting the right has a close relationship with the person who possesses the right [and] there is a hindrance to the possessor's ability to protect his own interests." *Sessions v. Morales-Santana*, ___ U.S. ___, 137 S. Ct. 1678, 1689, 198 L.Ed.2d 150 (2017). That exception does not apply here. SUWA has no special relationship with the United States and there is no barrier preventing the United States from asserting its right to title.

This court previously applied the third-party standing rule to hold SUWA lacked prudential standing "to vindicate the property rights of the federal government" in a nearly identical quiet title action. *Wilderness Soc'y v. Kane Cty.*, 632 F.3d 1162, 1165 (10th Cir. 2011) (en banc). In that case, we found SUWA improperly "rest[ed] its claims on the federal government's property rights" and failed to "assert a valid right to relief of its own." *Id.* at 1170. Even the dissent recognized that, if the statutory cause of action properly belonged to the United States, SUWA might not have standing. *See id.* at 1189–90 (Lucero, J., dissenting) (emphasizing the claim-focused nature of prudential standing and distinguishing *Warth v. Seldin*, 422 U.S. 490, 509–10, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).[2]

After *Wilderness Society*, the Supreme Court substantially narrowed the category of prudential standing. *See Lexmark*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392. The Court did not, however, revisit the doctrine of third-party standing. *See id.* at 127 n.3, 134 S.Ct. 1377 ("This case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can

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[2] In *Wilderness Society*, SUWA relied on an implied cause of action under the Supremacy Clause of the Constitution—a cause of action which is no longer recognized, *see Armstrong v. Exceptional Child Ctr., Inc.*, ___ U.S. ___, 135 S. Ct. 1378, 1383–84, 191 L.Ed.2d 471 (2015), but which at the time could be asserted by anyone. This is unlike a cause of action under the Quiet Title Act, which may be raised only by a party asserting title or interest in federally claimed land.

await another day."). The Supreme Court noted the third-party standing rule is "closely related to the question whether a person in the litigant's position will have a right of action on the claim." *Id.* (internal quotation marks omitted).[3]

Because *Lexmark* did not eliminate the third-party standing rule, our determination in *Wilderness Society* remains sound. Indeed, in light of *Lexmark*, its logic appears even stronger in this case. The only issue on remand from the 2014 appeal is the length and width of Kane County's easements. An organization in SUWA's position does not possess a cause of action under the Quiet Title Act because it does not assert title to the roads. *See* 28 U.S.C. § 2409a(a), (d). The cause of action properly belongs to Kane County and Utah, because they *do* assert title. Even if we assume SUWA will certainly suffer environmental injury, "that doesn't necessarily demonstrate that [it] has prudential standing to bring its . . . claims." *VR Acquisitions, LLC v. Wasatch Cty.*, 853 F.3d 1142, 1147 (10th Cir. 2017); *see also Hornish v. King Cty.*, 899 F.3d 680, 692

[3] Third-party standing has been traditionally considered as falling within the realm of "prudential standing." *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). But *Lexmark* casts doubt on this categorization and suggests the notion of "prudential standing" is in "tension" with the "virtually unflagging" duty of federal courts to "hear and decide cases within its jurisdiction," *id.* at 126, 134 S. Ct. 1377, 1386 (internal quotation marks omitted). It may be that the third-party standing rule, with its close connection to a party's right of action on a claim, should be considered as an aspect of Article III standing or as a merits ruling concerning the scope of the substantive right asserted.

(9th Cir. 2018) (finding a party that possesses "no property interests" in disputed land "cannot allege any injury to such interests, and therefore lack[s] standing" in a quiet title action).

Because SUWA's claim to relief rests "on the legal rights or interests of third parties," *Kowalski*, 543 U.S. at 129, 125 S.Ct. 564, I would also find SUWA lacks standing under the third-party standing doctrine.

## B. Intervention

Even if SUWA possessed standing to intervene, the district court did not abuse its discretion in determining SUWA fails to satisfy the Rule 24 requirements. Under Rule 24, an applicant may timely intervene as of right if it

> 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.

Fed. R. Civ. P. 24(a)(2). SUWA alleges it has an interest related to the property that may be impaired in the litigation and the United States may not adequately represent its interest.

### *1. Standard of Review*

"We review the district court's denial of a motion for reconsideration for abuse of discretion." *United States v. Randall*, 666 F.3d 1238, 1241 (10th Cir. 2011). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). "It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.*

SUWA argues the district court improperly characterized its filing as a motion to reconsider, and that we should treat its motion as one to intervene. The majority agrees and proceeds to analyze the Rule 24 requirements of interest, impairment, and adequate representation de novo, relying on *City of Colorado Springs v. Climax Molybdenum, Co.*, 587 F.3d 1071, 1078 (10th Cir. 2009). But *Climax* does not analyze *why* the standard of review should be de novo in such a case—though presumably it was because the issue was not raised or even considered by the court. In any event, its statement that the standard of review would be de novo is pure dicta because the court never reached the merits. And this court's assurances in *San Juan County* and *Kane County I* that SUWA could always renew its motion to intervene at a later date said nothing about what the proper standard of review would be in such an instance.

On the contrary, successive motions for intervention in the same case are frequently treated as motions to reconsider. *See*, *e.g.*, *Abeyta v. City of Albuquerque*, 664 F.3d 792, 796 (10th Cir. 2011) (a second motion to intervene is, in effect, a motion to reconsider); *Plain v. Murphy Family Farms*, 296 F.3d 975, 978 (10th Cir. 2002) (same); *see also Whitewood v. Sec'y Pa. Dep't of Health*, 621 F. App'x 141, 144 (3d Cir. 2015) (unpublished) (finding a successive motion for intervention was properly treated as a motion for reconsideration); *Calvert Fire Ins. Co. v. Environs Dev. Corp.*, 601 F.2d 851, 857 (5th Cir. 1979) (same).

This result is rooted in the law-of-the-case doctrine and the mandate rule. *See Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132–33 (10th Cir. 2001); *see also Ransmeier v. Mariani*, 486 F. App'x 890, 892 (2d Cir. 2012) (treating a successive motion to intervene as foreclosed by the law of the case). This is because once "a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal." *Huffman*, 262 F.3d at 1132. A district court may deviate from the law-of-the-case doctrine and mandate rule when one of the *Paraclete* circumstances is present: (1) a dramatic change in legal authority, (2) significant new evidence unobtainable earlier, or (3) blatant error resulting in manifest injustice. *See id* at 1133. And of course, such circumstances are the same as those justifying a

motion to reconsider, which is reviewed for abuse of discretion.

Furthermore, as the majority acknowledges, SUWA based its renewed motion for intervention on changed circumstances—namely a new legal and political landscape. *See* App. 119. SUWA's reliance on an intervening change of law or fact tracks the test for a motion to reconsider, not a motion to intervene. *See Paraclete*, 204 F.3d at 1012; *see also F.W. Kerr Chem. Co. v. Crandall Assoc., Inc.*, 815 F.2d 426, 428 (6th Cir. 1987) ("[A] successive motion [must] state new facts warranting reconsideration of the prior decision.").

In summary, I would apply the abuse of discretion standard to evaluate whether the district court properly denied SUWA's successive motion to intervene. That standard is more consistent with the law-of-the-case doctrine and more suitable to SUWA's changed-circumstance arguments.

### *2. Impaired Interest*

SUWA argues intervention is proper because it has an environmental interest relating to wilderness lands and resources that are crossed by or adjacent to the three disputed roads. It asserts the district court erred in finding no changed circumstances under which the court should revisit its prior ruling on SUWA's impaired interest related to the roads.

This court applies a fact-specific inquiry to determine whether a proposed intervenor possesses an

interest satisfying the requirements of Rule 24(a)(2) and (3). *San Juan Cty.*, 503 F.3d at 1199. The district court employed this method when it ruled on SUWA's first motion to intervene. *See Kane Cty. v. United States*, No. 2:08-CV-315, 2009 WL 959804 (D. Utah Apr. 6, 2009). There, the district court noted the "factual underpinnings of continuing controversy" that existed in *San Juan County* did not exist in the instant case. *Id.* at *2. It also observed title was the only issue in dispute, not the management of adjacent lands or whether the roads would be open to the public once title is ascertained. *Id.* On appeal in 2010, we declined to decide whether "SUWA has an interest in the quiet title proceedings at issue." *Kane Cty. I*, 597 F.3d at 1133.

We have previously said "Rule 24(a)(2) does not speak of 'an interest *in* the property'; rather, it requires only that the applicant for intervention 'claim[] an interest *relating to* the property or transaction which is the subject of the action." *San Juan Cty.*, 503 F.3d at 1200 (quoting Fed. R. Civ. P. 24(a)(2) (emphasis added). Indeed, in *San Juan County*, we applied a fact-specific inquiry to conclude "SUWA's environmental concern [was] a legally protectable interest" related to the specific lands at issue in that case. *Id.* at 1199.[3] In *Kane*

[3] Six judges disagreed. They explained in two separate concurrences that there "can be no logical or causal connection between the interest in land use asserted by SUWA and the dispute over land ownership in this case; a mere change in ownership will have no practical effect on the land's use, just as a change in the land's use would not affect the ownership" of the roads. *San Juan Cty.*, 503 F.3d at 1208 (Kelly, J., concurring in

*County I*, however, we acknowledged "*San Juan County* does not mandate a particular outcome in this case," given the fact-dependent nature of the inquiry. 597 F.3d at 1134.

Now that the issue is before us once again, I would conclude the district court reasonably determined the applicable law and issues on partial remand were the same as they were when the district court rendered its initial decision on SUWA's motion to intervene. Thus, in my view, the district court did not abuse its discretion in denying SUWA's motion to reconsider.

SUWA relies on *Utah Association of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001), to argue that anything but the narrowest title determination will impair its environmental interest, and the court appears to adopt this reasoning, *see* op. at 891–92. But unlike *Utah Association of Counties*, which involved the designation of a national monument and necessarily required balancing competing perspectives of the public interest, *see* 255 F.3d at 1248, this action simply addresses title. Quieting title does not bring any new rights into existence or require evaluation of the public interest, it merely clarifies already existing

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the judgment) (internal quotation marks omitted). In short, "it is hard to see how SUWA . . . can be considered a party to the question of what real property the United States owns, or whether the United States granted an easement to [the County] decades ago." *Id.* at 1210 (McConnell, J., concurring in the judgment).

property rights based on historical uses.[4] *See Stenehjem*, 787 F.3d at 921. The district court's final determination of title does not change land management or status. More importantly, the question on partial remand is even narrower than it was the last time the district court denied intervention: title to the easements has been ascertained and only the length and width of those easements is now in question. That inquiry turns only on pre-1976 use and does not require evaluation of competing public interests.

Because no intervening change of fact or law with respect to SUWA's alleged interest compels a different result, the district court did not abuse its discretion in declining to reconsider SUWA's motion for intervention. The district court's decision does not prevent SUWA from presenting its environmental concerns as amicus, nor does it preclude SUWA from asserting its alleged interests through other lawsuits or administrative challenges to federal use or management of lands adjoining the road easements.

### *3. Adequate Representation*

We presume adequate representation "when the objective of the applicant for intervention is identical to that of one of the parties." *San Juan Cty.*, 503 F.3d

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[4] By statute, national monuments and wilderness study areas are expressly "subject to valid existing rights." Pub. L. No. 94–579, § 701(h), 90 Stat. 2743, 2786; *accord* 43 U.S.C. § 1782(c) (providing the Secretary must manage wilderness study areas "subject . . . to the continuation of existing . . . uses").

at 1204. This presumption applies "when the government is a party pursuing a single objective." *Id.* The majority opines that, like *WildEarth Guardians v. United States Forest Service*, 573 F.3d 992, 994–97 (10th Cir. 2009), and *Utah Association of Counties*, the presumption of adequate representation does not apply because the government has multiple objectives and must consider a broad spectrum of views. But as I have already noted, this action simply addresses title. Although a shift in government policy may be enough to upset the presumption of adequate representation in an Administrative Procedure Act challenge, such as in *WildEarth* or *Utah Association of Counties*, it is difficult to see how it could be enough in a Quiet Title Act action that turns solely on pre-1976 use and does not involve any question of land-use or management policy. *WildEarth* itself said as much when it distinguished *San Juan County:* "We were not informed of any potential federal policy that could be advanced by the government's relinquishing its claim of title to the road." 573 F.3d at 997.

The last time this court considered SUWA's motion to intervene in this litigation, it held SUWA had failed to carry its minimal burden of demonstrating inadequate representation. We observed that "SUWA's disagreement with the United States' land management decisions in the past does not demonstrate that the United States is an inadequate representative in this title dispute, which is ultimately grounded in non-federal activities that predate those management decisions." *Kane Cty. I*, 597 F.3d at 1135.

Furthermore, we noted SUWA had waived the argument "that SUWA and the United States might disagree as to the potential scope of Kane County's purported rights-of-way." *Id.* Today, the majority resurrects an argument we ruled dead-on-arrival in *Kane County I* and essentially offers SUWA a second chance to cure its waiver.

SUWA emphasizes two circumstances it says have changed since the courts last considered its motion to intervene: (1) the change in presidential administration, and (2) the length and width of the three rights-of-way is now squarely presented to the district court and may be settled by the parties.

With respect to the first circumstance, SUWA extensively relates how the current presidential administration and BLM's approach to wilderness protection differs from that of their predecessors and explains the adversarial relations between itself and the new administration. This argument is nearly identical, as the government points out, to the argument SUWA raised and we rejected in the previous appeal—namely, that SUWA's "history of adversarial relations between itself and [federal defendants]" is inconsistent with adequate representation. *Id.* at 1134.

Moreover, SUWA's perceived disagreements with the current presidential administration or BLM over land-management policy bears little relation to how the United States will defend title to the roads

themselves.[5] In some cases—such as an APA suit against federal land-management policy, in which the government has multiple objectives and must balance a variety of public and private interests—a change of presidential administration can constitute a change in circumstance justifying reconsideration of adequate representation. *See W. Energy All. v. Zinke*, 877 F.3d 1157, 1169 (10th Cir. 2017). Indeed, all the cases the majority cites are APA challenges of this sort. But a change in presidential administration is *not* the sort of relevant change that affects adjudication of title in a Quiet Title Act action. Our decision in *Zinke* drew this very distinction: "[T]he only issue in [*Kane County* is] whether the defendant federal government or the plaintiff county [holds] title to rights of way over federal land, and [SUWA does] not claim to have unique knowledge or experience that would assist the BLM in defense of its title." *Id.*

With respect to the second circumstance, we recognized in *Kane County I* that SUWA waived the

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[5] Insofar as the administration's land-management policies have excluded parts of the relevant roads from the Grand Staircase-Escalante National Monument, those policies can be and have been challenged through the APA *See*, *e.g.*, *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) (holding executive orders on land-use subject to judicial review under the APA); Complaint for Declaratory and Injunctive Relief, Grand Staircase Escalante Partners v. Trump, No. 17–2591 (D.D.C. Dec. 4, 2017), 2017 WL 6033875. Such policies cannot properly be challenged through intervention in a Quiet Title Act action because reversing the United States' decision to relinquish parts of the Monument is not a possible remedy.

argument that it might disagree with the United States about the length or width of Kane County's rights-of-way. 597 F.3d at 1135. Even if we accepted that argument, as the majority does, SUWA presents no sufficient reason to doubt the United States will continue to defend its title, apart from speculation about settlement negotiations between the parties that it would still be powerless to stop as an intervenor. The only issue on remand turns exclusively "on the historic use of these roads by the public for the period required under Utah law prior to 1976." *Kane Cty.*, No. 2:08-CV-315, 2009 WL 959804, at *3. And that is not an issue on which SUWA has "special expertise, experience, or knowledge" that "would not be available to the United States" in defending the scope of its title. *Id.* Nor does SUWA provide persuasive argument that the interests of the United States and SUWA, which are presumed to align, diverge on answering that historically bound question.

SUWA's speculation that the United States will be less than zealous to defend its title cannot explain (1) why the United States has not settled this case two years into the new presidential administration, (2) why the parties did not request further stays to continue negotiation after the stay expired last year, or (3) why extensive discovery and depositions have continued in other pending road disputes between the parties. Nor can the majority opinion explain these present circumstances.

In my view, the district court did not abuse its discretion in concluding that SUWA's position was

based on speculation and "unsupported by any evidence other than statements by the parties [in 2017] that settlement might be possible." *Kane Cty. v. United States*, No. 2:08-CV-315-CW, 2018 WL 3999575, at *3 (D. Utah Aug. 21, 2018).

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Because I believe SUWA lacks standing to intervene and because the district court did not abuse its discretion in denying SUWA's motion to intervene under Rule 24(a), I respectfully DISSENT.

2018 WL 3999575
Only the Westlaw citation is currently available.
United States District Court, D. Utah.

KANE COUNTY, UTAH; and State of Utah, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.

Case No. 2:08-cv-315-CW
|
Signed 08/21/2018

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## MEMORANDUM DECISION & ORDER

Clark Waddoups, United States District Judge

Before the court is movant Southern Utah Wilderness Alliance's Motion to Intervene (ECF No. 298) and Motion to Supplement Factual Record in Pending Motion to Intervene as Defendants (ECF No. 320). The

Motion to Intervene is fully briefed, the time to respond to the Motion to Supplement has passed without response, and the parties have not requested oral argument. Kane County, the State of Utah, and the United States oppose intervention by SUWA. Having considered the briefs, the Motion to Supplement, and otherwise being fully informed, the court DENIES SUWA's Motion to Intervene for the reasons set forth herein.

**Background**

SUWA first moved to intervene as a matter of right in this action on November 26, 2008. (ECF No. 28.) After considering full briefing and oral argument, the court denied that motion because "SUWA ha[d] not established the element of having an impaired interest in the litigation" and because SUWA "ha[d] failed to show that its interest in this case are not adequately represented by the United States." (Intervention Order 4, ECF No. 71.) SUWA sought interlocutory appeal of that decision (ECF No. 75), and the Tenth Circuit affirmed this court's denial of SUWA's motion (Mandate of USCA, ECF No. 118). Without considering "whether SUWA has an interest relating to the quiet title claims alleged in Kane County's first amended complaint that may, as a practical matter, be impaired or impeded by the disposition of the litigation," the Tenth Circuit concluded that "even assuming SUWA has an interest, . . . SUWA has failed to establish that the United States may not adequately represent SUWA's interest." *Kane County v. United States*, 597

F.3d 1129, 1133 (10th Cir. 2010). Therefore, the court concluded SUWA was not entitled to intervene as of right and affirmed this court. *Id.* at 1135-36.

After the Tenth Circuit ruled on intervention, this court held a thirteen-day bench trial and issued findings of fact and conclusions of law. (Final Order, ECF No. 247.) This court quieted title to some, but not all, of the roads Kane County had alleged. (*Id.*) The parties appealed to the Tenth Circuit, which affirmed in part and reversed in part and remanded for this court to reconsider the scope of three roads. *Kane County v. United States of America*, 772 F.3d 1205 (10th Cir. 2014). This court then ordered the parties to file a status report informing the court whether further fact finding is needed. (Status Order, ECF No. 293.) The parties instead sought to stay the court's order because they were working toward resolution. (Motion for Stay, ECF No. 294.) The parties eventually filed separate status reports notifying the court that further fact finding is necessary. (Kane's Supplemental Brief and Request for Further Findings of Fact and Conclusions of Law, ECF No. 315; United States of America's Response, ECF No. 318.) No one has since filed anything with the court suggesting settlement is likely. While the parties were discussing settlement and filing their status reports, SUWA filed the instant motions.

SUWA now argues it is entitled to intervene as a matter of right because "the nature of this proceeding, as well as the United States' litigation position, have both changed" since the previous intervention

decisions by this court and the Tenth Circuit. (Motion to Intervene 2, ECF No. 298.) Specifically, SUWA contends "[t]he landscape has . . . changed significantly since [it] last moved to intervene," as a result of "the recent change in administration and the fact that the United States has entered into active settlement discussions in this case" without including SUWA in those discussions. (Motion to Intervene 1, ECF No. 22.) SUWA also argues that the court should reconsider its conclusion that SUWA has no impaired interest. (*Id.* at 2.) Each of the three parties to this litigation object to SUWA's Motion to Intervene.

**Analysis**

"Rule 24(a)(2) provides for intervention as of right by anyone who in a timely motion '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.'" *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009) (quoting Fed. R. Civ. P. 24(a)(2)). Assuming without deciding that SUWA timely filed its Motion to Intervene, the court denies the Motion because SUWA has not presented circumstances under which this court, exercising its discretion, is compelled to revisit its prior ruling and disregard the ruling of the Tenth Circuit.

The district court has "general discretionary authority to review and revise [its] interlocutory rulings prior to entry of final judgment." *Wagoner v. Wagoner*, 938 F.2d 1120 n. (10th Cir. 1991); *see also* Fed. R. Civ. P. 54(b). But because of the need for judicial economy, the court need not reconsider every interlocutory decision a party sees fit to challenge. Typically, "'[g]rounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.'" *Anderson Living Trust v. WPX Energy Prod., LLC*, 308 F.R.D. 410, 427 (D. N.M. 2015) (quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). And of course, barring a showing of an exception to the mandate rule, this court will follow the direction of the Tenth Circuit. *See Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132-33 (10th Cir. 2001). SUWA's Motion to Intervene does not directly speak to this court's authority or discretion to revisit previously decided matters. But in response to Kane County's opposition, which emphasizes SUWA's repeated failed efforts to intervene, SUWA points this court to *San Juan County* in which the court contemplated that an initial decision denying intervention "does not forever foreclose . . . intervention" and invited SUWA, as the would-be intervenor, to readdress the issue with the court "[i]f developments after the original application for intervention undermine the presumption that the Federal Defendants will adequately represent [their] interests." 503 F.3d 1163, 1207 (10th Cir. 2007) (en banc). (SUWA's Reply 8, ECF No. 316.) Regardless,

SUWA has not shown a change in circumstances that would alter this court's denial of intervention.

SUWA alleges that intervention is now proper because it has an interest that could be impaired and because the United States no longer represents its interests. First, SUWA alleges intervention is now proper despite the court's prior order because under *San Juan County* SUWA has an interest that may be impaired by this litigation and because SUWA's interest in preserving the wilderness characteristic of the lands surrounding the rights of way could be impaired by "[a]ny scope settlement that is not tightly correlated with reliable evidence as to pre-1976 uses and widths." (Motion to Intervene 8-10, ECF No. 298.) Whether an interest that would satisfy the requirements of Rule 24(a)(2) and (3) exists is a fact specific inquiry, *see San Juan County*, 503 F.3d at 1199, and this court has previously distinguished the facts of the relevant roads in Kane County from the road at issue in *San Juan County.* On appeal, the Tenth Circuit did not reach the impaired interest issue and instead "[p]roceed[ed] directly to" the fourth element of Rule 24(a) and "conclude[d] that, even assuming SUWA has an interest in the quiet title proceedings at issue" that SUWA should not be permitted to intervene. *Kane County*, 597 F.3d at 1133. This is hardly a decision on the merits that should prompt this court to revisit its prior decision.

And SUWA's argument that the issue of scope is distinct from the issue of title is unavailing. While a minority of the en banc court in *San Juan County*

indicated that, under the circumstances of that case, scope may be viewed different than title for purposes of the impaired interest analysis, the Tenth Circuit made clear in its intervention decision in this case that "*San Juan County* does not mandate a particular outcome in this case." 597 F.3d at 1134. In fact, scope is inherent in the quiet title process because as a practical matter the court cannot quiet title to an undefined property. As such, this court decided issues of scope in its quiet title decision. Therefore, where the issues before the court and the applicable law are the same as they were when the initial decision was rendered, the court declines to revisit the question of impaired interest. SUWA has not met its burden and for this reason is not entitled to intervention as of right.

Second, SUWA claims that the United States no longer adequately represents its interests because the issue in this litigation is no longer a binary question of title but a multifaceted question of scope and because the new administration has expressed willingness to engage in settlement negotiations in this and other R.S. 2477 cases. The court is unpersuaded by these arguments. As discussed, scope is inherent in the issue of quiet title and *San Juan County* does not mandate the outcome of this case. Further, while scope can be defined in multiple ways, there is no reason on this record to believe the United States would advocate for anything other than retention of the maximum amount of property. In *Western Energy Alliance v. Zinke*, 877 F.3d 1157 (10th Cir. 2017), upon which

SUWA relies for the proposition that a change in administration may justify intervention, the court determined the United States did not represent the interests of the environmental groups seeking to intervene. But the *Western Energy Alliance* court distinguished the *Kane County* intervention decision from cases in which "the government has multiple objectives." *Id.* at 1169. Whereas the cases *Western Energy Alliance* relies on involve government regulations issued for resource management purposes where the relevant agency was acting under a multiple-use mandate, *id.*, here the question is title to real property and the scope of that property for purposes of quieting title. Unlike in *Western Energy Alliance*, SUWA has not set forth any actual competing interests or motivations that would cause the United States to take a position other than advocating for the narrowest possible right of way.

And the allegation that the United States has softened its litigation position as a result of the change in administration is unsupported by any evidence other than statements by the parties that settlement may be possible. Where the terms of any proposed settlement are unknown, the mere possibility of settlement cannot support a conclusion that one of the parties has abdicated its positions.[1] And even though

[1] The court also concludes that the possibility of settlement cannot alone be a basis for permitting intervention because the Tenth Circuit has made clear an intervenor cannot veto a settlement agreement reached by the parties. *San Juan County*, 503 F.3d at 1189 ("In particular, we should mention again that an intervenor has no power to veto a settlement by other parties.").

there may have been efforts to settle this dispute, the record does not support SUWA's claims. Despite the parties' previous statements that a settlement may be possible, they later filed status reports in which they represented that further fact finding is necessary for the resolution of the matter. (Kane's Supplemental Brief and Request for Further Findings of Fact and Conclusions of Law, ECF No. 315; United States of America's Response, ECF No. 318.) This indicates to the court that a settlement is not as likely as SUWA suggests. Further, SUWA references the other R.S. 2477 litigation as evidence of possible settlement, but in those cases the United States continues to actively litigate and is currently engaged in the discovery process. Without a showing that the United States has an incentive to advocate for less than its full rights to the real property at issue or a showing that, regardless of incentives, it has abandoned that position, the court cannot on speculation alone conclude that the United States is no longer adequately representing SUWA's interests in limiting each right of way. Given the presumption that the United States will represent the good of the public, the court cannot conclude on this record that the United States will do anything other than continue to fully litigate this action.

For these reasons, the court is not persuaded that there has been a change in circumstances justifying a

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Therefore, to conclude that the possibility of settlement requires that SUWA should be permitted to participate in litigation is unworkable because, regardless of its intervention status, SUWA would have no recourse to avoid the settlement.

change in the court's prior intervention decision. Therefore, SUWA's Motion to Intervene is DENIED.

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United States District Court,
D. Utah,
Central Division.

KANE COUNTY, UTAH,
a Utah political subdivision, Plaintiff,
v.
UNITED STATES of America, Defendant.

No. 2:08-CV-315.
April 6, 2009.

Elizabeth B. Harris, Shawn T. Welch, Kendra L. Shirey, Holme Roberts & Owen LLP, Salt Lake City, UT, William L. Bernard, Kanab, UT, for Plaintiff.

John K. Mangum, U.S. Attorney's Office, Salt Lake City, UT, Romney S. Philpott, U.S. Department of Justice (ENR-663) Environmental & Natural Resources Division, Washington, DC, for Defendant.

MEMORANDUM DECISION AND ORDER

CLARK WADDOUPS, District Judge.

Kane County, Utah, filed this action against the United States under the Quiet Title Act, 28 U.S.C. § 2409A, seeking to quiet title to fifteen roads and rights-of-way in Kane County, Utah. Kane County claims that under 43 U.S.C. § 932, the roads at issue were established as public rights-of-way prior to the Act being repealed in 1976. Such roads are commonly referred to as R.S. 2477 roads. The Southern Utah Wilderness Alliance, the Wilderness Society and the Sierra Club (collectively "SUWA") have moved to intervene in the action both as of right under Rule

24(a)(2) of the Federal Rules of Civil Procedure and, in the alternative, for permissive intervention under Rule 24(b). SUWA argues that it is seeking to intervene to defend claims set forth in the Complaint by Kane County against the United States. Both Kane County and the United States oppose the intervention by SUWA.

***INTERVENTION AS A MATTER OF RIGHT***

Under Rule 24(a)(2), an applicant for intervention should be permitted to intervene if the following elements are satisfied:

> (1) the application is "timely"; (2) "the applicant claims an interest relating to the property or transaction which is the subject of the action"; (3) the applicant's interest "may as a practical matter" be "impair[ed] or impede[d]"; and (4) "the applicant's interest is [not] adequately represented by existing parties."[1]

Of the elements required to establish intervention, Kane County and the United States raise only the issues of whether SUWA, as a practical matter, has an interest that may be impaired or impeded and whether SUWA's interest is adequately represented by the existing parties. The issues raised in this motion have previously been addressed in similar or nearly similar

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[1] *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dep't of the Interior*, 100 F.3d 837, 840 (10th Cir. 1996); Fed.R.Civ.P. 24(a)(2).

cases, both in this court and in the Tenth Circuit.[2] The factors to be considered in the analysis and the applicable principles have been set forth extensively in those cases, particularly in *San Juan County*, and will not be repeated here.

In this case, as it did in the previous cases, SUWA argues that it has an interest that may be impaired by the pending litigation because of its long and extensive role in protecting wilderness lands in Southern Utah, including Kane County. SUWA argues that even though the only issue in this litigation is who holds title to the roads at issue, the wilderness characteristics of the area and how the lands adjacent to the roads are managed may be affected by who holds title. It argues that Kane County has been insensitive to protecting the wilderness characteristics of the lands and SUWA should therefore be allowed to intervene on behalf of its constituents to argue vigorously that title should be held by the United States. In *San Juan County*, seven of the thirteen judges addressing the "interest" issue found that SUWA, in that case, had sufficiently established an interest in the litigation to meet that element of Rule 24(a)(2).[3] SUWA argues that

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[2] *See*, *e.g.*, *San Juan County v. United States*, 503 F.3d 1163 (10th Cir. 2007) (*en banc*) (hereinafter "*San Juan County*"); *Utah (Emery County) v. United States*, No. 2:05-cv-540, 2008 WL 4571787 (D.Utah Oct. 8, 2008) (hereinafter "*Emery County*"); *Utah (Juab County) v. United States*, No. 2:05-cv-714, 2008 WL 4170017 (D.Utah Sept. 3, 2008) (hereinafter "*Juab County*").

[3] *San Juan County*, 503 F.3d at 1199-1200.

the same facts that led to this conclusion in *San Juan County* compel the same finding in this case.

The United States and Kane County argue to the contrary that the determination of whether the applicant has a sufficient interest to intervene is highly fact specific. They argue that, unlike the roads at issue in *San Juan County*, the roads at issue here have been open to the public for many years and thus, compel a different conclusion as to whether SUWA has a sufficiently impaired interest to meet the requirements of the rule. SUWA counters that while twelve of the roads have been open to the public for many years, three of the roads are closed and a finding of title in favor of Kane County would risk these roads being opened to the public. SUWA argues that, at least as to these three roads, under *San Juan County*, it has met the requirement to show an impaired interest.

As is evident from the Complaint, the only issue in this case is whether Kane County can establish that it holds title to the roads at issue. How the lands adjacent to the roads will be managed and whether the roads themselves will be open to the public once title is determined are not issues that are relevant to the determination of the quiet title action. In this case, it is evident that SUWA does not have a "legal interest" in the usual understanding of that word in a title context. While SUWA obviously has an interest in the sense that it cares deeply about the outcome of the decision, it does not claim title to the roads at issue. This conclusion was evident by SUWA's concession at oral argument that, were the United States and Kane

County to resolve all of the title issues as to the roads without SUWA's consent or participation, SUWA would have no right to continue with the action and the action would be dismissed.

Based on the specific facts in this case and the differences between the issues raised by Kane County and those in *San Juan County*, the court finds that SUWA has not established the element of having an impaired interest in the litigation. The issues raised in this case do not include the same factual underpinnings of continuing controversy over roads into areas that have been protected by the National Park Service as did the roads at issue in *San Juan County.* Nevertheless, were the court to conclude that *San Juan County* requires a different conclusion, SUWA would still not meet the requirements for intervention because it has failed to show that its interests in this case are not adequately represented by the United States.

### ***ADEQUATE REPRESENTATION***

SUWA argues that the United States will not adequately represent its interests in the quiet title action. SUWA supports this argument by setting forth a history of adversarial relationships between SUWA and the Bureau of Land Management ("BLM"), and facts that it indicates support a conclusion that the United States has been unwilling to defend vigorously SUWA's interests. SUWA has presented facts from which one could conclude that it has, on occasion,

disagreed with the BLM on how the lands adjacent to the roads at issue should be managed. It also has presented facts to show that SUWA takes a more aggressive stance to preserving the wilderness characteristics of these lands than it contends has been taken by the BLM in the management of the lands adjacent to the roads at issue. Nevertheless, the management of the lands has no bearing on the issue raised by the Complaint.

The only issue to be resolved, as SUWA conceded at oral argument, is whether the United States or Kane County holds title. Whether Kane County can establish the requirements to show that it holds title to the roads based on R.S. 2477 will turn entirely on the historic use of these roads by the public for the period required under Utah law prior to 1976. In neither its briefing nor at a oral argument was SUWA able to proffer any evidence to which it would have access about the historical use of the roads that is not available to the United States. Moreover, SUWA does not present evidence that it has any special expertise, experience or knowledge with respect to the historic use of the roads that would not be available to the United States.

Indeed, the primary focus of SUWA's briefing in support of its motion is its long history of advocating to preserve the wilderness characteristics of the lands and the risks that opening the roads to the public may have on preserving such wilderness areas. None of these facts is relevant to the determination of whether Kane County holds title. In *Emery County*, the court

reached the same conclusion.[4] In *San Juan County*, the court reminded that "nothing we have said would contravene the holding that Rule 24(a)(2) does not require intervention as of right for the purpose of presenting only irrelevant argument or evidence."[5] The only arguments that SUWA appears to be prepared to make in this case that would not be made by the United States are those relating to the management of the land, which would be irrelevant and not admissible in evidence.

The United States argues that it has been and will be vigorous in defending its claim to legitimate title to the roads. The record does not compel a different conclusion. Absent evidence showing that the United States will not vigorously defend this position, there is no basis to allow intervention by SUWA.

### ***PERMISSIVE INTERVENTION***

SUWA argues that even if the court concludes that it does not meet the requirements for intervention as a matter of right, it should be allowed to intervene permissively under Rule 24(b). Rule 24(b) provides that the court may permit intervention to an applicant who

> (A) is given a conditional right to intervene by a federal statute; or

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[4] *Emery County*, 2008 WL 4571787, at *9.

[5] *San Juan County*, 503 F.3d at 1203.

> (B) has a claim or defense that shares with the main action a common question of law or fact.[6]

SUWA does not claim that it has a conditional right to intervene pursuant to any federal statute. SUWA does argue, however, that "conservation groups seeking to intervene on behalf of the government [should be allowed to intervene where they] assert defenses that are 'directly responsive to the claims . . . asserted by plaintiffs.' "[7] SUWA maintains that it does intend to assert claims that are common with those that are at the center of this action.

To support its proposition, SUWA cites to *Kootenai Tribe.* In that case, however, the court found that the government had declined to defend fully and that the intervenors would assist in a resolution of the issues which would impact varied interests. Under those circumstances, the court found it was not an abuse of discretion to allow intervention. In this case, the United States has not declined to defend. Instead, it asserts its intent to fully defend.

Further, Kane County and the United States respond that SUWA's intervention in the case will not add any additional insight to the arguments that will be presented by the parties. As noted, the only issue in this case is whether Kane County or the United States

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[6] Fed.R.Civ.P. 24(b).

[7] SUWA's Memo. in Supp. of Mot. to Intervene, at 32 (quoting *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002)).

owns title to the fifteen roads at issue. In *Emery County*, the court concluded: "Resolution of this issue will not involve any 'claims' or 'defenses' in common with SUWA's asserted conservation interest. Rather, it is limited to the question of title, an issue the court has already found is adequately represented by the United States."[8] The court finds that the conclusion reached by the court in *Emery County* is equally applicable to this case. There is nothing in the briefing nor the arguments to suggest that SUWA would offer any additional defenses or claims relevant to the issue to be decided that would not already be fully and completely advocated by the United States. Indeed, SUWA does not share any claim or defense in this action that is different from any other member of the public who cares deeply about the outcome of this litigation. To allow SUWA to intervene in this action under Rule 24(b) would be an invitation to any member of the public who holds strong views about the outcome to seek to intervene. The court finds that intervention is not appropriate under these circumstances.

The motion is DENIED.[9]

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[8] *Emery County*, 2008 WL 4571787, at 9.

[9] Docket No. 28.

United States Court of Appeals,
Tenth Circuit.
KANE COUNTY, UTAH, a political subdivision,
Plaintiff-Appellee,
v.
UNITED STATES of America,
Defendant-Appellee.
Southern Utah Wilderness Alliance,
Wilderness Society, Sierra Club, Movants-Appellants.

No. 09-4087,
March 8, 2010.

Heidi J. McIntosh, Southern Utah Wilderness Alliance, Salt Lake City, UT (Steven H.M. Bloch, Southern Utah Wilderness Alliance, Salt Lake City, UT; Edward B. Zukoski and Andrea Zaccardi, Earthjustice, Denver, CO, with her on the briefs), for Movants to Intervene-Appellants Southern Utah Wilderness Alliance, Wilderness Society, and Sierra Club.

Shawn T. Welch (Kendra L. Shirey and Janna B. Custer with him on the brief ), of Holme, Roberts & Owen LLP, Salt Lake City, UT, for Plaintiff-Appellee Kane County, Utah.

Aaron P. Avila, Attorney, Environment & Natural Resources Division, United States Department of Justice, Washington, DC (John C. Cruden, Acting Assistant Attorney General; Brett L. Tolman, United States Attorney; John K. Mangum, Assistant United States Attorney; James E. Karkut, Office of the Regional Solicitor Department of the Interior, Salt Lake City, UT; Romney S. Philpott, Attorney, Environment & Natural

Resources Division, United States Department of Justice, Washington, DC, with him on the brief), for Defendant-Appellee United States.

Before KELLY, EBEL, and BRISCOE, Circuit Judges.

BRISCOE, Circuit Judge.

Southern Utah Wilderness Alliance, The Wilderness Society and the Sierra Club (collectively SUWA) appeal from the district court's denial of their motion to intervene in this action brought by Kane County, Utah, to quiet title to several purported rights-of-way across federal public lands within Kane County. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

## I

Kane County encompasses approximately 1.6 million acres of federal public land, nearly 1.3 million acres of which lie within the Grand Staircase-Escalante National Monument (Monument). The non-Monument federal public land that lies within Kane County includes wilderness study areas, as well as portions of land that SUWA is advocating for protection under its long-proposed America's Red Rock Wilderness Act (a piece of legislation that has been repeatedly introduced, but never adopted by Congress). Historically, Kane County officials have maintained public transportation routes that pass through or abut these areas of federal public land.

On April 25, 2008, Kane County initiated this action by filing a complaint against the United States under the Quiet Title Act, 28 U.S.C. § 2409a, seeking to quiet title to two roads, Mill Creek Road and Bald Knoll Road, both of which are located in western Kane County, approximately 20 miles northeast of Kanab, Utah, and cross portions of federal public land.[1] The complaint alleged that under a Reconstruction-era law known as Revised Statute 2477 (R.S. 2477)[2], Kane County had "accepted R.S. 2477 rights-of-way for" these two roads "on public lands not reserved for public uses." App. at 19. More specifically, the complaint alleged that Kane County had designated both roads "as public highways and [had] expend[ed] public funds to construct and maintain these roads prior to [the] October 21, 1976" repeal of R.S. 2477. *Id.* In addition, the complaint alleged that both roads had been "continuous[ly] use[d] as public thoroughfares for a period in excess of ten years prior" to the repeal of R.S. 2477. *Id.* at 20. The first claim alleged in the complaint sought

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[1] The two roads actually encompass five segments of Kane County routes: Mill Creek Road includes segments of three different Kane County route numbers (K4400, K4410, and K4405) and Bald Knoll Road includes segments of two different Kane County route numbers (K3930A and K3935).

[2] "R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, § 706(a), 90 Stat. 2743, 2793. But that Act explicitly protect[ed] R.S. 2477 rights-of-way in existence at the time of its enactment. Because such a right-of-way could have come into existence without any judicial or other governmental declaration, much litigation continues over whether rights-of-way were in fact created on public land." *San Juan County v. United States*, 503 F.3d 1163, 1168 (10th Cir.2007) (internal quotation marks and citations omitted).

to quiet title to Kane County's purported "R.S. 2477 public highway right-of-way for the Mill Creek [R]oad," "includ[ing] a right-of-way width of 66 feet. . . ." *Id.* at 35. The second claim alleged in the complaint sought, in similar fashion, to quiet title to Kane County's purported R.S. 2477 public highway right-of-way for Bald Knoll Road, "includ[ing] a right-of-way width of 66 feet. . . ." *Id.* at 36.

On July 14, 2008, the United States filed an answer asserting six specific defenses to the two claims alleged in Kane County's complaint: (1) the district court "lack[ed] jurisdiction over the subject matter of th[e] action due to [Kane County]'s failure to satisfy the 'particularity' requirement of the Quiet Title Act and thereby invoke a waiver of the United States' sovereign immunity under the Act," *id.* at 61; (2) the district court "lack[ed] jurisdiction over the subject matter of th[e] action due to [Kane County]'s failure to allege facts sufficient to show that it c[ould] satisfy the statute of limitations set forth in the Quiet Title Act," *id.;* (3) the district court "lack[ed] jurisdiction over the subject matter of th[e] action due to [Kane County]'s failure to allege a justiciable case or controversy between the parties," *id.*; (4) Kane County "failed to state a claim upon which relief c [ould] be granted," *id.*; (5) Kane County "failed to join indispensable parties under Rule 19 of the Federal Rules of Civil Procedure with respect to the claimed rights-of-way that cross[ ] private land," *id.* at 62; and (6) Kane County's "claims are barred by the statute of limitations in the Quiet Title Act." *Id.*

On September 24, 2008, Kane County moved for leave to file an amended complaint. Attached to the motion was a proposed amended complaint asserting seven additional claims to quiet title to ten additional roads: Skutumpah, Swallow Park/Park Wash, North Swag and Nipple Lake Roads in western Kane County; and Sand Dune, Hancock, and four Cave Lakes Roads in southwestern Kane County. *Id.* at 98-129. The United States did not oppose the motion. On October 30, 2008, the district court granted Kane County's motion. *Id.* at 143. Kane County's amended complaint was subsequently filed on November 10, 2008.

On November 26, 2008, SUWA moved for leave to intervene as of right "as a defendant in th[e] action pursuant to Fed.R.Civ.P. 24(a)(2)." *Id.* at 210. "In the alternative, SUWA request[ed] leave to permissively intervene pursuant to Fed.R.Civ.P. 24(b)." *Id.* Both Kane County and the United States opposed SUWA's motion to intervene.

On April 6, 2009, the district court issued a memorandum decision and order denying SUWA's motion to intervene. After outlining the requirements for intervention as of right under Rule 24(a)(2), the district court noted that Kane County and the United States disputed "only the issues of whether SUWA, as a practical matter, ha[d] an interest that m[ight] be impaired or impeded and whether SUWA's interest [wa]s adequately represented by the existing parties." *Id.* at 772. With respect to the first of these issues, the district court concluded:

> As is evident from the Complaint, the only issue in this case is whether Kane County can establish that it holds title to the roads at issue. How the lands adjacent to the roads will be managed and whether the roads themselves will be open to the public once title is determined are not issues that are relevant to the determination of the quiet title action. In this case, it is evident that SUWA does not have a "legal interest" in the usual understanding of that word in a title context. While SUWA obviously has an interest in the sense that it cares deeply about the outcome of the decision, it does not claim title to the roads at issue. This conclusion was evident by SUWA's concession at oral argument that, were the United States and Kane County to resolve all of the title issues as to the roads without SUWA's consent or participation, SUWA would have no right to continue with the action and the action would be dismissed.
>
> Based on the specific facts in this case and the differences between the issues raised by Kane County and those in *San Juan County*, the court finds that SUWA has not established the element of having an impaired interest in the litigation. The issues raised in this case do not include the same factual underpinnings of continuing controversy over roads into areas that have been protected by the National Park Service as did the roads at issue in *San Juan County.*

*Id.* at 773-74 (emphasis added). The district court further concluded that SUWA had "failed to show that

its interests in th[e] case [we]re not adequately represented by the United States," *id.* at 774:

> The only issue to be resolved, as SUWA conceded at oral argument, is whether the United States or Kane County holds title. Whether Kane County can establish the requirements to show that it holds title to the roads based on R.S. 2477 will turn entirely on the historic use of these roads by the public for the period required under Utah law prior to 1976. In neither its briefing nor at a[sic] oral argument was SUWA able to proffer any evidence to which it would have access about the historical use of the roads that is not available to the United States. Moreover, SUWA does not present evidence that it has any special expertise, experience or knowledge with respect to the historic use of the roads that would not be available to the United States.
>
> Indeed, the primary focus of SUWA's briefing in support of its motion is its long history of advocating to preserve the wilderness characteristics of the lands and the risks that opening the roads to the public may have on preserving such wilderness areas. None of these facts is relevant to the determination of whether Kane County holds title. * * * In *San Juan County*, the court reminded that "nothing we have said would contravene the holding that Rule 24(a)(2) does not require intervention as of right for the purpose of presenting only irrelevant argument or evidence." The only arguments that SUWA appears to be prepared to make in this case

> would not be made by the United States are those relating to the management of the land, which would be irrelevant and not admissible in evidence.
>
> The United States argues that it has been and will be vigorous in defending its claim to legitimate title to the roads. The record does not compel a different conclusion. Absent evidence showing that the United States will not vigorously defend this position, there is no basis to allow intervention by SUWA.

*Id.* at 775-76 (emphasis added). Lastly, the district court rejected SUWA's request for permissive intervention, concluding "there [wa]s nothing in the briefing nor the arguments to suggest that SUWA would offer any additional defenses or claims relevant to the issues to be decided that would not already be fully and completely advocated by the United States," and that "SUWA d[id] not share any claim or defense . . . that [wa]s different from any other member of the public who cares deeply about the outcome of th[e] litigation." *Id.* at 777.

## II

In this appeal, SUWA challenges both the district court's denial of its motion to intervene as of right under Rule 24(a)(2), and the district court's denial of its motion for permissive intervention under Rule 24(b). We review de novo a district court's ruling on a motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). *Coal. of Ariz./N.M. Counties For Stable*

*Econ. Growth v. Dep't of the Interior*, 100 F.3d 837, 840 (10th Cir.1996). We review rulings on permissive intervention under Rule 24(b) for abuse of discretion. *Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 89-90 (10th Cir.1993).

### *I. Intervention as of right*

"Rule 24(a)(2) provides for intervention as of right by anyone who in a timely motion '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.'" *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir.2009) (quoting Fed.R.Civ.P. 24(a)(2)). It is undisputed in this case that SUWA timely moved to intervene. Thus, the propriety of SUWA's motion to intervene as of right hinges on: (1) whether SUWA has an interest relating to the quiet title claims alleged in Kane County's first amended complaint that may, as a practical matter, be impaired or impeded by the disposition of the litigation; and (2) whether the United States, in defending against Kane County's quiet title claims, will adequately represent SUWA's interest. Proceeding directly to the latter of these inquiries, we conclude that, even assuming SUWA has an interest in the quiet title proceedings at issue, SUWA has failed to establish that the United States may not adequately represent SUWA's interest. Consequently, we agree

with the district court that SUWA was not entitled to intervene as of right under Rule 24(a)(2).

*a) Adequacy of the United States' representation of SUWA's interests*

"Even if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its 'interest is adequately represented by existing parties.'" *San Juan County*, 503 F.3d at 1203 (quoting Fed.R.Civ.P. 24(a)(2)).

In *San Juan County*, this court, sitting en banc, was presented with a nearly identical "adequacy of representation" question, but was unable to reach a consensus in resolving that question. To begin with, only seven of the thirteen members of the en banc court concluded that SUWA had a legally protectable interest in the quiet title action, and thus only those seven members reached the merits of the "adequacy of representation" question.[3] The lead opinion in *San Juan County* concluded, in a section garnering the votes of only three of those seven members, that a presumption of adequate representation applied because the government and SUWA shared the "single objective" of defending exclusive title to the roads at issue. *Id.* at 1204

[3] The remaining six members of the en banc court concluded that intervention by SUWA was improper both because SUWA lacked a legally protectable interest in the quiet title action, and because, in any event, intervention was barred by sovereign immunity. Those six judges, together with the three judges who joined the lead opinion, comprised a majority that effectively affirmed the district court's denial of intervention.

(opinion of Hartz, J.). In that same section, the lead opinion further concluded that SUWA could not overcome this presumption because it provided "no reason to believe that the [government] ha[d] any interest in relinquishing . . . any part of the federal title to the road" at issue. *Id.* at 1207.

In contrast, four of the seven members concluded that "SUWA [had] satisfied its minimal burden of showing that the [government might not] adequately represent SUWA's interests in th[e] litigation." *Id.* at 1227 (Ebel, J., concurring in part, dissenting in part). This conclusion was based, in pertinent part, on the notion that the quiet title action at issue would not "require[] a simple binary determination" of whether "San Juan County ha[d] a right-of-way easement or not," but instead would involve a "more nuanced" determination that included "not only whether there [wa]s any right-of-way, but also the nature and scope of that right-of-way if it d[id] exist." *Id.* at 1228.

Although *San Juan County* does not mandate a particular outcome in this case, we are persuaded, based upon comparing the arguments made by SUWA in this case regarding the adequacy of representation question with the rationales adopted by the two competing contingents in *San Juan County*, that SUWA has failed to establish that its interest in the instant case will not be adequately represented by the federal government. As noted, the four members of the en banc court who concluded that intervention should have been granted in *San Juan County* emphasized that the quiet title action at issue there would involve a

"nuanced" determination encompassing "not only whether there [wa]s any right-of-way, but also the nature and scope of that right-of-way if it d[id] exist." *Id.* at 1228 (Ebel, J., concurring in part, dissenting in part). In seeking to intervene in this case, however, SUWA made no such assertion regarding the quiet title claims alleged by Kane County. Instead, SUWA argued below only that (1) the history of adversarial relations between itself and the Bureau of Land Management (BLM) demonstrated that the United States might not adequately represent SUWA's interests, and (2) "BLM ha[d] not shown a willingness to defend federal control of its routes in the face of [prior] County claims and actions." App. at 244. Moreover, SUWA conceded at the hearing on its motion before the district court that "[t]he only issue to be resolved . . . [wa]s whether the United States or Kane County h[eld] title" to the roads at issue. *Id.* at 775. To be sure, SUWA's counsel attempted, upon questioning at oral argument before this court, to argue that SUWA and the United States might disagree as to the potential scope of Kane County's purported rights-of-way. But any argument in that regard has, for purposes of this appeal, been waived. See *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("[A] federal appellate court does not consider an issue not passed upon below."); *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1143 (10th Cir.2009) ("Absent extraordinary circumstances, we will not consider arguments raised for the first time on appeal."). Further, SUWA has not challenged on appeal the district court's findings that SUWA failed to (a) "proffer any evidence to which it

would have access about the historical use of the roads that [wa]s not available to the United States," or (b) "present evidence that it ha[d] any special expertise, experience or knowledge with respect to the historic use of the roads that would not be available to the United States." App. at 775.

As for the two arguments actually asserted below by SUWA, we are not persuaded they are sufficient, either alone or together, to establish that the federal government will fail to adequately represent SUWA's interests. Indeed, we agree with the federal government that those arguments "rel[y] on inapplicable cases involving intervention in challenges to administrative action as well as irrelevant speculation about and critiques of potential litigation strategies by the" federal government, and "SUWA's disagreement with the United States' land management decisions in the past does not demonstrate that the United States is an inadequate representative in this title dispute, which is ultimately grounded in non-federal activities that predate those management decisions." Gov't Br. at 20. Moreover, we note that, as was the case in *San Juan County*, the federal government "ha[s] displayed no reluctance [in these proceedings], at least so far as the record before us shows, to claim full title to" the roads at issue, and "SUWA has provided no basis to predict that the [federal government] will fail to present . . . an argument on the merits that SUWA would make." 503 F.3d at 1206 (opinion of Hartz, J.).

*b) Conclusion*

For the reasons outlined above, we conclude the district court did not err in rejecting SUWA's motion to intervene as a matter of right under Rule 24(a). Assuming, for purposes of argument, that SUWA has a valid interest in these quiet title proceedings, it has failed to establish, at this stage of the litigation, that the federal government will not adequately protect its interest.

## *II. Permissive Intervention*

Federal Rule of Civil Procedure 24(b) governs permissive intervention. Subsection (b)(1)(B) thereof requires the potential intervenor to show that it "has a claim or defense that shares with the main action a common question of law or fact." Further, Rule 24(b)(3) states that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." The grant of permissive intervention lies within the discretion of the district court. *City of Stilwell v. Ozarks Rural Elec. Coop.*, 79 F.3d 1038, 1043 (10th Cir.1996).

In its motion to intervene, SUWA argued, in addressing the possibility of permissive intervention, that it "intend[ed] to assert claims and defenses that [we]re in common with those that [we]re at the center of th[e] action: whether the facts and circumstances of th[e] case support[ed] a finding that Kane County h[eld] a valid [right-of-way] under R.S. 2477 to" the

routes at issue. App. at 247. SUWA also noted that "in its proposed answer [it] raise[d] a number of defenses concerning whether Kane County c[ould] maintain its action under the Quiet Title Act." *Id.* Lastly, SUWA asserted that its "presence in the litigation w[ould] not cause 'undue delay or prejudice' " because "[t]he parties [we]re at the very beginning of the case, and SUWA agree [d] to abide by the schedules set by the [district court]." *Id.* at 248.

The district court, in denying SUWA's request for permissive intervention, first noted that unlike the situation in *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir.2002), the sole case relied upon by SUWA in support of permissive intervention, the United States in this case had "assert[ed] its intent to fully defend" against Kane County's quiet title claims. *Id.* at 777. Continuing, the district court concluded that resolution of Kane County's quiet title claims would not involve any claims or defenses in common "with SUWA's asserted conservation interest." *Id.* Rather, the district court concluded, the claims were "limited to the question of title, an issue . . . adequately represented by the United States." *Id.* Further, the district court noted "[t]here [wa]s nothing in the briefing nor the arguments to suggest that SUWA would offer any additional defenses or claims relevant to the issue to be decided that would not already be fully and completely advocated by the United States." *Id.* Finally, the district court concluded that because "SUWA d[id] not share any claim or defense in th[e] action that [wa]s different from any other member of the public who

cares deeply about the outcome of th[e] litigation," "allow[ing] SUWA to intervene . . . under Rule 24(b) would be an invitation to any member of the public who holds strong views about the outcome to seek to intervene." *Id.*

On appeal, SUWA challenges the district court's ruling, but only very briefly. SUWA asserts that "the district court abused its discretion because it erroneously held that SUWA [wa]s obligated to offer 'additional defenses or claims relevant to the issue to be decided' from those offered by the United States." Aplt. Br. at 50. SUWA argues "[t]his is clear legal error that warrants reversal" because "Rule 24(b) contains *no requirement* that intervenors offer a separate or additional claim or defense." *Id.* (emphasis in original).

Although SUWA is correct in noting that Rule 24(b) does not require a permissive intervenor to assert a separate or additional claim or defense, nothing in the Rule necessarily prohibits a district court, in exercising its discretion under Rule 24, from taking that fact into consideration (and SUWA has cited no cases holding that that is an improper consideration under Rule 24(b)). Moreover, even assuming, for purposes of argument, that the district court erred in relying on this factor, SUWA has not challenged the three other rationales offered by the district court for denying SUWA's request for permissive intervention. Thus, SUWA has not established that the district court's decision was "an arbitrary, capricious, whimsical, or

manifestly unreasonable judgment." *See Nalder v. West Park Hosp.*, 254 F.3d 1168, 1174 (10th Cir.2001) (defining abuse of discretion review) (internal quotations omitted).

AFFIRMED.

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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KANE COUNTY, UTAH,
a Utah political subdivision,

Plaintiff - Appellant/
Cross-Appellee,

and

THE STATE OF UTAH,

Intervenor Plaintiff -
Appellant/Cross-Appellee,

v.

UNITED STATES
OF AMERICA,

Defendant - Appellee/
Cross-Appellant.

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SOUTHERN UTAH WILDER-
NESS ALLIANCE, et al.,

Movants.

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SIERRA CLUB, et al.,

Amici Curiae.

Nos. 13-4108,
13-4109 & 13-4110
(D.C. No. 2:08-CV-
00315-CW)

## ORDER

(Filed Sep. 2, 2014)

At the specific direction of the panel assigned to hear these cases at oral argument on September 29, 2014, these matters are before the court on the motion of the Southern Utah Wilderness Alliance and The Wilderness Society to intervene in the appeals. We also have responses in opposition to the motion, as well as a reply.

On November 13, 2013, the motion to intervene was granted provisionally, but the order also noted that provisional ruling would be "subject to reconsideration by the panel of judges that [would] be assigned later." The panel has now considered the motion, the responses and reply, as well as all the briefing in these matters. Upon consideration, and at the direction of that panel, the motion to intervene is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

950 F.3d 1323
United States Court of Appeals, Tenth Circuit.

KANE COUNTY, UTAH, Plaintiff-Appellee,
and
The State of Utah, Intervenor Plaintiff-Appellee,
v.
UNITED STATES of America, Defendant-Appellee.
Southern Utah Wilderness Alliance; The Wilderness Society, Movants-Appellants.

No. 18-4122

FILED February 27, 2020

(D.C. No. 2:08-CV-00315-CW), (D. Utah)

Before TYMKOVICH, Chief Judge, BRISCOE, LUCERO, HARTZ, HOLMES, BACHARACH, PHILLIPS, MORITZ, EID, and CARSON, Circuit Judges.*

**ORDER**

This matter is before the court on the *Petition by United States of America for Rehearing En Banc*, and *Appellees Kane County, Utah and State of Utah's Petition for Panel Rehearing and Request for En Banc Rehearing.* Appellants have filed a consolidated response to both petitions.

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* The Honorable Scott M. Matheson and the Honorable Carolyn B. McHugh are recused and did not participate in the consideration of the rehearing petitions.

The Utah Appellees' request for panel rehearing is denied by a majority of the original panel members. Chief Judge Tymkovich would grant panel rehearing.

Both petitions and the response were transmitted to all non-recused judges of the court who are in regular active service, and a poll was called. Because an equal number of participating judges voted against rehearing as voted for it, the requests for en banc rehearing are denied. *See* Fed. R. App. P. 35(a) ("[a] majority of the circuit judges who are in regular active service" may order en banc rehearing).

Chief Judge Tymkovich, as well as Judges Hartz, Holmes, Eid and Carson would grant en banc rehearing. Judge Phillips has filed a separate concurrence in the denial of en banc rehearing, which Judge Briscoe joins. Chief Judge Tymkovich has written separately in dissent. Judges Hartz and Holmes join in Part II of the dissent, and Judges Eid and Carson join the dissent in full.

PHILLIPS, Circuit Judge, joined by BRISCOE, Circuit Judge, concurring in the denial of rehearing en banc.

This case fails the standard governing en banc consideration. *See* Fed. R. App. P. 35(a)(1) and 10th Cir. R. 35.1(A). Our local rule directs us that "[a] request for en banc consideration is disfavored[,]" and that "[e]n banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that

conflicts with a decision of the United States Supreme Court or of this court." 10th Cir. R. 35.1(A).

In this case, the en banc dissent contends that the panel decision conflicts with controlling precedent. Obviously, this requires a greater showing than that the en banc dissenters would have ruled differently than did the panel.[1] With this in mind, I will discuss how the panel-majority's opinion fits well within controlling precedents. In fact, as will be seen, much of the panel-majority's opinion is compelled by binding precedent, and the remainder properly rested with the panel to decide.

## I. Panel Rulings Alleged to Contravene Supreme Court and Tenth Circuit Precedents

### *A. Standing*

In *Kane County v. United States* (*Kane III*), 928 F.3d 877 (10th Cir. 2019), the case now before us, the panel majority concluded that the Southern Utah Wilderness Association (SUWA) had established standing to seek intervention as of right under Fed. R. Civ. P. 24(a)(2). The panel ruled that SUWA had met the standing requirement in two separate ways—piggyback standing and Article III standing. Either suffices.

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[1] In this regard, we must be mindful to filter out any attempts to reargue our earlier precedents. Here, that is particularly important to remember when encountering the en banc dissent's discussion of *San Juan County v. United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc).

1. Piggyback Standing

Applying the rule announced in *Town of Chester v. Laroe Estates, Inc.*, ___ U.S. ___, 137 S. Ct. 1645, 198 L.Ed.2d 64 (2017), the panel majority first ruled that SUWA had established piggyback standing[2] to proceed with its motion to intervene. *Kane III*, 928 F.3d at 886–87. The panel acknowledged that the availability of piggyback standing had narrowed from when we applied that doctrine in *San Juan County v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc). Specifically, the panel majority addressed that point as follows:

> But ten years later [after *San Juan County*], the Supreme Court modified our "piggyback standing" rule, holding that an intervenor as of right must "meet the requirements of Article III if the intervenor wishes to pursue relief not requested" by an existing party. *Town of Chester*, . . . 137 S. Ct at 1648[.] In that case, the record was ambiguous whether the intervening plaintiff was seeking a different form of relief from the existing plaintiff: a separate award of money damages against the same defendant in its own name. *Id.* at 1651–52. Because "[a]t least one [litigant] must have standing to seek each form of relief

[2] This term refers to the situation in which a proposed intervenor relies on the Article III standing of a party to a lawsuit. *See United States v. Colo. & E. R.R. Co.*, 882 F.3d 1264, 1268 (10th Cir. 2018) ("NDSC could not 'piggyback' on the standing of one of the described parties to the Consent Decree because there was no current case or controversy pending before the court on the part of those parties[.]").

> requested," the Court remanded for the circuit court to determine whether the intervenor, in fact, sought "additional relief beyond" what the plaintiff requested. *Id.* at 1651.
>
> Citing *Town of Chester*, Kane County argues that SUWA cannot simply invoke the United States' Article III standing, contending that SUWA and the United States are pursuing different relief. We disagree with that view. After all, the United States has informed us that it seeks "retention of the maximum amount of property" and will argue for "the smallest widths [it] can based on the historical evidence," the same relief that SUWA seeks. *See* United States' Resp. Br. at 22, 32; Oral Arg., at 18:30.

*Kane III*, 928 F.3d at 886–87 (second, third, and fourth alterations in original) (footnotes omitted). As seen, the *Kane III* panel majority applied piggyback standing in accordance with *Town of Chester*. Piggyback standing was available because the United States and SUWA seek the *same relief*.

The en banc dissent disputes the panel-majority's ruling that SUWA satisfied piggyback standing under *Town of Chester*. First, the en banc dissent asserts that the panel majority "held that SUWA was excused from establishing standing, or, in the alternative, that it had adequately done so." En banc dissent at 1331 (citing *Kane III*, 928 F.3d at 886–89). Certainly, the panel majority ruled that SUWA could piggyback the United States' Article III standing. But the panel majority correctly applied the *Town of Chester* standard in doing

so. Second, the en banc dissent correctly asserts that under *Town of Chester*, "where an intervenor pursues separate relief from a party, it must establish standing under Article III." *Id.* at 1331 (citing *Town of Chester*, 137 S. Ct at 1648) (emphasis removed). But the en banc dissent wrongly ascribes to the panel majority a position it never took, saying that "[a]ccording to the majority, SUWA's interests are thus similar enough to the United States' to avoid having to establish its own standing under *Town of Chester*." *Id.* at 1332. In fact, the block quote above shows that the panel majority disagreed with Kane County's argument that "SUWA and the United States are pursuing different relief." *Kane III*, 928 F.3d at 887. After reciting how the United States characterized its own interest, the panel majority concluded that the United States was seeking "the *same relief* that SUWA seeks." *Id.* (emphasis added). This being so, the panel majority allowed SUWA to piggyback on the United States' Article III standing. *Id.* The en banc dissent errs in saying that the panel majority read *Town of Chester* as approving piggyback standing when an intervenor's and party's interests are "similar enough." *See* en banc dissent at 1332. Third, the en banc dissent claims that the majority read *Town of Chester* as embracing a "more expansive point"[3] than permitted by *Hollingsworth v. Perry*, 570

[3] Immediately before this statement, the en banc dissent cites *Town of Chester* as "holding merely that '*at the least*, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond which the plaintiff requests.' " En banc dissent at 1332. The Court's point preceding these quoted words was that just as with plaintiffs and multiple plaintiffs, "[a]t

U.S. 693, 704, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013), and two of this court's decisions[4] "establishing that *any* person seeking relief from a federal court must demonstrate standing to do so." En banc dissent at 1332 (next quoting *Hollingsworth* in a parenthetical for the

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least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester*, 137 S. Ct. at 1651. The Court next simply states that "[t]he same principle applies to intervenors of right." *Id.* That gives the en banc dissent no basis to say that the *Kane III* panel majority reads *Town of Chester* expansively.

[4] In particular, the en banc dissent cites two Tenth Circuit cases. First, it cites *Colorado & Eastern Railroad*, 882 F.3d at 1269. En banc dissent at 1332. Unlike *Hollingsworth* at least, *Colorado & Eastern* was decided after *Town of Chester*, in fact by eight months. But *Colorado & Eastern* had no reason to address *Town of Chester*, because *Colorado & Eastern* raised no piggyback-standing issue. *Colo. & E. R.R.*, 882 F.3d at 1269. Instead, the intervenor-appellant there asserted standing solely under Article III. *Id.* Facing that issue, we ruled that the intervenor-appellant had failed to establish Article III standing, reasoning that "the record conclusively establishes that the relief requested by NDSC will not redress any assumed injury to it caused by C & E[.]" *Id.* Second, it cites *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 912 (10th Cir. 2017). En banc dissent at 1332. That case came two days after *Town of Chester* and did not cite it. Instead, *Safe Streets Alliance* cited *Hollingsworth* as abrogating *San Juan County*'s expansive piggyback-standing rule. *Safe Streets All.*, 859 F.3d at 912; *Cf. San Juan Cty.*, 503 F.3d at 1172 (holding "that parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing 'so long as another party with constitutional standing on the same side as the intervenor remains in the case' "). The panel majority acknowledged the demise of *San Juan County*'s broad piggyback standing rule and turned to *Town of Chester. See Kane III*, 928 F.3d at 887. But just as *Safe Streets Alliance* needed to acknowledge and apply *Hollingsworth*, so too did the panel majority here need to acknowledge and apply *Town of Chester.*

proposition that "[o]ne essential aspect of [the powers conferred by Art. III] is that any person invoking the power of a federal court must demonstrate standing to do so"). But *Hollingsworth* must be read in accordance with *Town of Chester*, which was decided four years later. Fourth, the en banc dissent mixes into its Article III standing analysis its Rule 24(a)(2) adequacy-of-representation analysis. *Id.* at 1332–33. The two analyses do not mix this way. For piggyback standing, *Town of Chester* tells us exactly what to consider here—that is, whether the intervenor is seeking the *same* relief as a party is. 137 S. Ct. at 1651. By contrast, the Rule 24(a)(2) adequacy-of-representation analysis looks not only to the degree of similarity of the sought interests but to the degree the party will assert them. *See San Juan Cty.*, 503 F.3d at 1206. The panel majority applied the piggyback-standing requirements in accordance with *Town of Chester*, and in doing so it contravened neither Supreme Court nor Tenth Circuit law.

2. Article III Standing

Separate and apart from piggyback standing, the majority panel ruled that SUWA had shown its own standing under Article III. In this regard, the majority recognized that SUWA needed to show "(1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury can likely be redressed by a favorable decision." *Kane III*, 928 F.3d at 888 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,

528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).

In concluding that SUWA had met these requirements, the panel majority turned to the primary case the en banc dissent claims the majority's decision contravenes—*San Juan County.* The panel majority noted that "[h]ere, as in *San Juan County*, it is 'indisputable that SUWA's environmental concern is a legally protectable interest.' " *Kane III*, 928 F.3d at 888 (citing *San Juan Cty.*, 503 F.3d at 1199).[5] We noted that "[i]n *San Juan County*, we recognized that 'if the County prevails, it will then pursue opening the road to vehicular traffic that SUWA has been trying to prevent.' " *Id.* (citing *San Juan Cty.*, 503 F.3d at 1200). We explained that in *San Juan County* we had seen "nothing speculative about the impact on SUWA's interests if the County prevails in its quiet-title action" and further noted that *San Juan County* had stated that the opening of roads was the whole point of the lawsuit. *Kane III*, 928 F.3d at 888 (quoting *San Juan Cty.*, 503 F.3d at 1201–02) (internal quotation marks omitted). And we "acknowledge[d] that *San Juan County* involved the

[5] In a footnote, the panel majority stated that "[t]hough this portion of the opinion concerned the potential impairment of SUWA's interests under Rule 24(a)(2), other courts have recognized that 'any person who satisfies Rule 24(a) will also meet Article III's standing requirement.' *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *see also Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) ('Any interest of such magnitude as to support Rule 24(a) intervention of right is sufficient to satisfy the Article III standing requirement as well.') (internal quotations and alterations omitted)." *Kane III*, 928 F.3d at 888 n.14.

possibility of reopening closed roads, as opposed to widening already-opened roads, as here—but we view both as sufficient degrees of impact." *Kane III*, 928 F.3d at 888–89. On this point, we observed that "[a] 24-foot road allows more traffic than a 10- or 12-foot road (in the case of North Swag and Swallow Park roads), and a 66-foot road allows more traffic than a 24- to 28-foot road (in the case of Skutumpah Road)." *Id.* at 889.

In my view, the en banc dissent does not fully credit that the seven-judge majority in *San Juan County* ruled that SUWA had established a protectible interest under Fed. R. Civ. P. 24(a)(2). The *Kane III* panel majority merely followed in its wake.

### *B. Right to Intervene Under Fed. R. Civ. P. 24(a)(2)*

#### 1. Title or Property-Rights Dispute

The en banc dissent describes the underlying suit as one solely involving property law, an ownership dispute between the governmental parties. En banc dissent at 1330–31, 1333, 1334. From this, it concludes that "[a]s a quiet title action, this dispute focuses solely on the various ownership rights the parties have in the disputed rights-of-way. SUWA has no role in such litigation because it lacks any independent ownership claim in the disputed property." *Id.* at 1334. From this, I gather that the dissent concludes that environmental groups (or any others lacking an ownership claim) can never intervene in R.S. 2477 suits. *See id.* (saying that "[t]he nature of the suit [described as a property dispute] further compels this result"—that SUWA cannot

show standing under Article III). This ignores the *San Juan County*'s seven-judge majority's two-sentence statement that "[w]e recognize that SUWA does not claim that it has title to Salt Creek Road, even though this is a quiet-title suit. But Rule 24(a)(2) does not speak of 'an interest in the property'; rather, it requires only that the applicant for intervention 'claim[] an interest *relating to* the property or transaction which is the subject of the action.'" 503 F.3d at 1200 (quoting Fed. R. Civ. P. 24(a)(2)) (alterations in original).

In addition, as mentioned, the seven-judge majority in *San Juan County* agreed that SUWA had satisfied the first portion of Fed. R. Civ. P. 24(a)(2)—namely, that in that R.S. 2477 suit involving the Salt Creek Road, SUWA had "claim[ed] 'an interest relating to the property or transaction which is the subject of the action and . . . is so situated that the disposition of the action may as a practical matter impair or impede [the movant's] ability to protect [its] interest.'" *See* 503 F.3d at 1201. I agree that six judges would have held differently. *Id.* at 1210 (Kelly, J., concurring[6]) (concluding that "SUWA ha[d] not 'asserted an interest'" relating to the property at issue in the lawsuit); *id.* (McConnell, J., concurring[7]) (agreeing with the three-judge lead opinion's "conclusion that the district court correctly denied SUWA's motion to intervene, but . . . not agree[ing] with its reasoning"). In view of the *San*

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[6] Joined by Chief Judge Tacha and Judges Porfilio, O'Brien, McConnell, and Holmes.

[7] Joined by Chief Judge Tacha and Judges Porfilio, Kelly, O'Brien, and Holmes.

*Juan County* split, I do not see how the *Kane III* panel-majority's opinion would contravene *San Juan County.*

Next, the en banc dissent says that the panel majority contravened *Kane County v. United States* (*Kane I*), 597 F.3d 1129 (10th Cir. 2010). En banc dissent at 1331, 1335 n.5, 1335. But as the panel majority detailed in *Kane III*, the *Kane I* panel declined to consider whether the United States had adequately represented SUWA on the scope of the rights-of-way (as opposed to the binary determination of title). It declined for one reason—that SUWA had failed to preserve the argument. 928 F.3d at 883 (citing *Kane I*, 597 F.3d at 1135). And on that point, the *Kane I* panel—as had the seven-judge majority in *San Juan County*—acknowledged that SUWA may later try again to intervene on scope grounds despite having waived the ability to do so in that particular appeal. *See Kane I*, 597 F.3d at 1135 (ruling that SUWA "has failed to establish, at this stage of the litigation, that the federal government will not adequately protect its interest"); *San Juan Cty.*, 503 F.3d at 1207 (noting that this denial of SUWA's motion to intervene "does not forever foreclose SUWA from intervention" and that "[i]f developments after the original application for intervention undermine the presumption that the Federal Defendants will adequately represent SUWA's interest, the matter may be revisited").

2. Adequacy of Representation

On this question, the seven-judge majority in *San Juan County* split into two opinions. In Part IV(B) of Judge Hartz's three-judge lead opinion, he concluded that the United States would adequately represent SUWA's interests. *See id.* at 1203–07. In Judge Ebel's four-judge opinion, he concurred in all but this part of Judge Hartz's opinion. *See id.* at 1226–27. As mentioned, the remaining six judges concurred in judgment but did not comment on the adequacy-of-representation issue. Thus, because blocs of three-judges and six-judges concluded that SUWA had not shown that it was entitled to intervene (for different reasons), the Judge Hartz three-judge opinion became the lead opinion on the adequacy-of-representation issue.

The *Kane III* panel majority did not contravene *Kane I*, which had denied SUWA intervention on adequacy-of-representation grounds. As mentioned, in *Kane I*, the court raised the possibility that the adequacy-of-representation result might hinge on SUWA's having relied on scope as well as title, but the panel ruled that SUWA had waived that issue on appeal. So *Kane I* obviously did not take a view that *San Juan County* somehow rendered the scope issue as off limits.

Nor could *Kane I* have taken such a view. The three-judge lead opinion in *San Juan County* runs forty pages, about four of which pertain to the adequacy-of-representation issue. In the lead opinion, Judge Hartz looked to the amended complaint's claims,

including one for declaratory judgment, and he noted that the district court when denying intervention to SUWA had "stated that 'the pleadings define the case in a very narrow fashion[:] the existence or non-existence of a right-of-way and its length and its breadth[.]'"[8] *San Juan Cty.*, 503 F.3d at 1206. He then held that "on the record before us, SUWA will be adequately represented by the Federal Defendants with respect to the quiet-title claim." *Id.* Presumably speaking to that record, which becomes important, he "recognize[d] that SUWA and the NPS have had their differences over the years regarding Salt Creek Road[,]" but emphasized that "when SUWA filed its application to intervene, the Federal Defendants had only a *single litigation objective*—namely, *defending exclusive title to the road*—and SUWA could have had *no other objective* regarding the quiet-title claim." *Id.* (emphasis added). He continued along this line when noting that "[t]he Federal Defendants have displayed no reluctance, at least so far as the record before us shows, *to claim full title* to Salt Creek Road." *Id.* (emphasis added). He noted that "SUWA has given us no reason

[8] The en banc dissent contends that the panel majority "reads the lead opinion from *San Juan County* as consistent with its conclusion that the scope of the rights-of-way was not at issue in that case." En banc dissent at 1335 n.5. In opposition, the en banc dissent quotes a portion of *San Juan* referencing a portion of the amended complaint in *San Juan* alleging that "the right-of-way must be sufficient in scope for vehicle travel[.]" *Id.* (quoting *San Juan Cty.*, 503 F.3d at 1171). I agree the amended complaint alleged this and that scope ultimately needed determined, but the amended complaint's allegation does not refute the above-quoted portions of *San Juan*'s lead opinion.

to believe that the Federal Defendants have any interest in relinquishing to the County *any part of the federal title* to the road." *Id.* at 1207 (emphasis added). And perhaps most importantly, he also noted that though "the Federal Defendants may not wish to exercise their authority as holder of title in the same way that SUWA would wish,[9] *the district court did not treat such exercise of authority as being at issue in this litigation when SUWA's application for intervention was rejected.*" *Id.* 1206–07 (footnote and emphasis added).

Judge Hartz's three-judge lead opinion addressed Judge Ebel's four-judge opinion (which had dissented on the adequacy-of-representation issue) in just one respect. Judge Hartz stated that "we are not inclined to infer from the Federal Defendants' opposition to intervention that they will fail to vigorously resist the claim to an RS 2477 right-of-way." *Id.* at 1206. He did not comment on Judge Ebel's extensive discussion about how the United States "may not adequately represent" SUWA's interest on the scope of the right-of-way. *See Id.* at 1227 (Ebel, J., concurring in part and dissenting in part).

With this background in *San Juan County*, it is no wonder the *Kane I* panel, after reviewing the *San Juan County* case, commented that "*San Juan County* does not mandate a particular outcome in this case[.]" 597 F.3d at 1134. The panel noted that SUWA had not argued in the district court for a more nuanced

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[9] This sounds to me as a recognition that the United States and SUWA might well disagree on the scope of any rights-of-way.

"determination encompassing 'not only whether there [wa]s any right-of-way, but also the nature and scope of that right-of-way if it d[id] exist.'" *Id.* (quoting *San Juan Cty.*, 503 F.3d at 1228 (Ebel, J., concurring in part and dissenting in part)). Though SUWA, upon questioning at oral argument in *Kane I*, argued that it "and the United States might disagree as to the potential scope of Kane County's purported rights-of-way[,]" the court held that argument waived "for purposes of this appeal[.]" *Id.* at 1335.

For the reasons given, I respectfully submit that the *Kane III* majority panel did not contravene any Supreme Court or Tenth Circuit caselaw, which defeats the present request for en banc consideration.

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TYMKOVICH, Chief Judge, joined as to Part II by HARTZ and HOLMES, Circuit Judges, and joined in full by EID and CARSON, Circuit Judges, dissenting from the denial of rehearing en banc.

This case should be reheard en banc. The panel majority's decision rests on an overbroad understanding of Article III standing and extends a right of intervention to third parties who have no legal interest at issue in the dispute. In doing so, the majority contravenes Supreme Court precedent and that of this court, and thus should be corrected. Moreover, the decision opens the intervention doors to parties that wish to disrupt property disputes between the United States and state and local governments—a common

occurrence in the Western United States—and make them proxy battlegrounds for the airing of specialty interests.

This case is one of many regarding the scope of unadjudicated road claims across the American West.[1] The Southern Utah Wilderness Alliance (SUWA) wishes to intervene and shape the litigation; Utah and the United States assert SUWA has no interest that will not be adequately represented by the United States. Although this court has become accustomed to interest group participation in cases regarding the administration of public lands, this is no such case. Instead, all that is presently before the court is a property dispute that will be resolved by looking to the pre-1976 uses of the lands at issue. After adjudication of the property claims, when and if the court is presented with the question of how best to *administer* such property, the logic and rationale of the majority's opinion may prove sufficient to permit SUWA's participation. But to extend such reasoning here contravenes established principles of standing and intervention. *See San Juan Cty. v. United States*, 503 F.3d 1163, 1211 (10th Cir. 2007) (McConnell, J., concurring) ("As citizens and users, SUWA's members have enforceable statutory rights regarding how the land is administered *if* the United States owns the land, but they have

[1] As the United States asserts, it currently faces "more than 12,000" R.S. 2477 claims in Utah alone. Pet. by United States for Reh'g En Banc 8.

no legal rights regarding *whether* the United States owns the land.").

The instant suit is a R.S. 2477 roadway case[2]—an ownership dispute between the United States on the one hand and the State of Utah and Kane County on the other. The underlying controversy has a long history, but all that presently remains is a determination of the width and length of three rights-of-way that Kane County and the State of Utah possess. *See Kane Cty. v. United States*, 772 F.3d 1205, 1223 (10th Cir. 2014) (*Kane II*).

The question is one of property law. And the answer turns exclusively "on the historic use of these roads by the public for the period required under Utah law prior to 1976." *Kane Cty. v. United States*, No. 2:08-CV-315, 2009 WL 959804, at *3 (D. Utah Apr. 6, 2009); *see also Kane II*, 772 F.3d at 1223.

In 2008, Kane County first sued the United States under R.S. 2477 and the Quiet Title Act to quiet title in fifteen roads that cross federal land, including the three rights-of-way presently in dispute. Shortly

[2] In 1866, Congress granted public access to unreserved public lands by providing that the "right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Mining Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932). This statute is commonly referred to as "R.S. 2477." In 1976, Congress repealed this broad grant, but grandfathered in all "valid" rights of way in existence at the time. *See* Pub. L. No. 94-579, §§ 701(a), 706(a), 90 Stat. at 2786, 2793. Accordingly, those claiming a right of way may sue for quiet title to the property under the Quiet Title Act, as the Utah entities did here.

thereafter, SUWA moved to intervene. *See Kane Cty.*, 2009 WL 959804, at *1. The district court denied SUWA's motion and this court affirmed. *See Kane Cty. v. United States*, 597 F.3d 1129 (10th Cir. 2010) (*Kane I*). After a bench trial, the district court held Kane County and the State of Utah proved their claims with respect to twelve of the roads in question, and it resolved the scope of those rights-of-way. *See Kane Cty. v. United States*, No. 2:08-cv-00315, 2013 WL 1180764, at *62–65 (D. Utah Mar. 20, 2013). The United States appealed the district court's decision, and this court reversed in part, leaving the scope of the three rights-of-way currently at issue as the sole remaining matter pending in this case. *Kane II*, 772 F.3d at 1223.

Although SUWA does not claim title to the roads, it now again seeks to intervene, alleging interests and inadequate representation relating to the hypothetical future use of the three remaining rights-of-way. The district court denied SUWA's motion. The panel majority's opinion reversed. *Kane Cty. v. United States*, 928 F.3d 877, 887 (10th Cir. 2019) (*Kane III*). The majority first held that SUWA was excused from establishing standing, or, in the alternative, that it had adequately done so. *Id.* at 886–89. The majority further held that SUWA was entitled to intervene as of right under Federal Rule of Civil Procedure 24(a) because SUWA had shown an interest at risk of being impaired and that the United States may not adequately represent SUWA's interests. *Id.* at 891–96.

The majority's opinion conflicts with our precedent and that of the Supreme Court on two issues—standing and intervention.

## *I. Article III Standing*

"Standing is a threshold issue in every case before a federal court." *Phila. Indem. Ins. Co. v. Lexington Ins. Co.*, 845 F.3d 1330, 1334 (10th Cir. 2017). The majority's opinion enlarges Article III standing in contravention to Supreme Court authority in two ways. As a threshold matter, it holds SUWA, as an intervening party, need not establish standing. *Kane III*, 928 F.3d at 886–87. Then, in the alternative, it finds SUWA nonetheless cleared this necessary hurdle. *Id.* at 888–89.

### *A. Applicability of the Standing Requirement*

To intervene, SUWA must establish standing. The majority relies on *Town of Chester v. Laroe Estates, Inc.*, for the proposition that SUWA need not establish standing because it seeks the same relief as the United States. *See Kane III*, 928 F.3d at 887–88 (citing ___ U.S. ___, 137 S. Ct. 1645, 198 L.Ed.2d 64 (2017)). *Town of Chester*'s holding was a narrow one—where an intervenor pursues *separate relief* from a party, it must establish standing under Article III. *See* 137 S. Ct. at 1648. But the case assuredly does not hold that where the intervenor seeks relief *similar* to the existing parties, it may avoid establishing standing. *See id.* at 1651 (holding merely that "*at the least*, an intervenor of right must demonstrate Article III standing when it

seeks additional relief beyond that which the plaintiff requests" (emphasis added)). The majority's reading of *Town of Chester* to embrace this more expansive point conflicts with case law from the Supreme Court and this court establishing that *any* person seeking relief from a federal court must demonstrate standing to do so. *Hollingsworth v. Perry*, 570 U.S. 693, 704, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013) ("One essential aspect of [the powers conferred by Art. III] is that any person invoking the power of a federal court must demonstrate standing to do so."); *United States v. Colo. & E. R.R. Co.*, 882 F.3d 1264, 1269 (10th Cir. 2018) ("Any party, whether original or intervening, that seeks relief from a federal court must have standing to pursue its claims."); *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 912 (10th Cir. 2017) ("Rule 24(a)'s provisions cannot remove the Article III hurdle that *anyone* faces when voluntarily seeking to enter a federal court.").

The majority's attempt to distinguish these cases falls short. With respect to *Colo. & E. R.R.*, the majority quotes a description of the district court's opinion, claiming that the case is inapposite because there was no "live controversy" between the parties in *Colo. & E. R.R.* and here there is. *See Kane III*, at 887 n.11. This point is not what the decision on appeal was based on. *See Colo. & E. R.R. Co.*, 882 F.3d at 1269 ("Because the record conclusively establishes that the relief requested by [the party seeking to establish standing] will not redress any assumed injury to it . . . we resolve [the] appeal on that basis."). With respect to *Safe Streets* and *Hollingsworth*, the majority argues the

statements in *Safe Streets* were merely dicta and that, regardless, *Hollingsworth* "applied the piggyback standing rule." *Kane III*, at 887 n.11. But nothing in *Hollingsworth* suggests its statements with respect to standing constitute an affirmation of the piggyback standing rule. Indeed, this court has already recognized *Hollingsworth* as abrogating that rule. *See Safe Streets*, 859 F.3d at 913.

Accordingly, under *Town of Chester, Hollingsworth*, and our precedent, SUWA invariably must establish standing in order to join this suit. In excusing SUWA from this requirement, the majority performed an end-run around the constitutional limit that Article III places on the power of the federal courts. *Hollingsworth*, 570 U.S. at 704, 133 S.Ct. 2652.

Even accepting the majority's premise that standing is excused where an intervenor seeks similar relief to that of an existing party, the majority's conclusion still suffers a fatal inconsistency. To justify its contention that SUWA seeks the same relief as the United States, the majority concedes that the United States "seeks retention of the maximum amount of property and will argue for the smallest widths it can based on the historical evidence"—in other words, "the same relief that SUWA seeks." *Kane III*, 928 F.3d at 887. According to the majority, SUWA's interests are thus similar enough to the United States' to avoid having to establish its own standing under *Town of Chester*. But this contradicts the majority's later conclusion that the United States will not adequately represent SUWA's interests. *See Kane III*, 928 F.3d at 898 (Tymkovich, J.,

dissenting) ("If SUWA seeks identical relief to the United States—that is, federal retention of the maximum amount of property—then the United States provides adequate representation of SUWA's interests. . . . If SUWA seeks relief different from the United States—because the government does not, in fact, wish to retain maximum property—then SUWA must demonstrate that it possess standing according to *Town of Chester*.").

Were this a case regarding the administration of the land at issue, as opposed to merely its ownership, the majority could potentially thread the needle in the manner it seeks to here. *See Kane III*, 928 F.3d at 898 n.1 (Tymkovich, J., dissenting). For example, in administrative cases like the ones cited by the majority, the United States usually must consider a wide array of interests and engage in extensive balancing. *See, e.g., Doe v. Zucker*, No. 117-CV-1005, 2019 WL 111020 (N.D.N.Y. Jan. 4, 2019). This could lead to the type of symmetry in relief sought, yet asymmetry in ultimate resolution objectives, that could justify intervention along the lines the majority proposes. But in the context of a property dispute like the present one, such fine distinctions break down.

### *B. SUWA's Standing*

Perhaps realizing SUWA must demonstrate standing to intervene, the majority holds that SUWA established standing. *See Kane III*, 928 F.3d at 888. That conclusion is in error. SUWA's alleged injury is

too attenuated and speculative to provide standing under Article III to participate in this suit regarding the relative property rights of the United States and the Utah entities.

To establish Article III standing, an intervenor must first show "'an injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted). Second, there must be a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly traceable to the challenged action of the defendant.'" *Id.* Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561, 112 S.Ct. 2130.

SUWA's argument, adopted by the majority, stands on a series of conjectures regarding hypothetical future land use. To conclude SUWA has standing, one must assume: "(1) the United States will not zealously defend its title to the relevant roads, (2) the title adjudication will thus lead to an appreciably different outcome regarding pre-1976 uses, (3) this appreciable difference will lead Kane County to open the relevant roads to greater vehicular traffic than it would have otherwise, and finally, (4) the greater vehicular traffic will, at the margin, cause aesthetic environmental injury to SUWA members who may return to the particular areas in the future." *Kane III*, 928 F.3d at 899–900

(Tymkovich, J., dissenting). This attenuation proves too much.

As the Court found in *Clapper v. Amnesty International USA*, such a theory of "future injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" 568 U.S. 398, 401, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). In *Clapper*, the Court declined to find that human rights, labor, legal, and media organizations had standing to challenge the Foreign Intelligence Surveillance Act as unconstitutional because the Court found allegations that the organizations would be subject to the surveillance authorized by the Act too speculative. The Court noted its reluctance "to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 413, 133 S.Ct. 1138. The Court's hesitancy is well-founded and should be applied here to preclude SUWA from joining this case where its only supposed injury relies on a highly attenuated chain of possibilities. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (rejecting environmental organizations' standing claims where they were similarly premised on a series of speculation).

The nature of the suit further compels this result. As a quiet title action, this dispute focuses solely on the various ownership rights the parties have in the disputed rights-of-way. SUWA has no role as a party in such litigation because it lacks any independent

ownership claim in the disputed property.[3] This case does not create any new property rights, does not concern the administration of the land at issue, and will not directly result in any physical changes to the subject property. Instead, it concerns solely what property rights exist in light of pre-1976 uses of the roads at issue. *See Kane II*, 772 F.3d at 1223–24.

Moreover, any future improvements that Kane County might make that could significantly affect the surrounding lands will require additional consultation with the federal government. *See S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 748–49 (10th Cir. 2005) ("[E]ven legitimate changes in the character of the roadway require consultation when those changes go beyond routine maintenance."). In short, although SUWA may have valid considerations it wishes to present to whichever party owns the property at issue regarding how to manage that land, this is not the forum to present these arguments. The present suit merely concerns which regulator will be the recipient of such advocacy in the future as the owner of, and therefore the party responsible for administering, the land.

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[3] In reaching this conclusion, I need not, and do not, take the position that an environmental group "can never intervene" in an R.S. 2477 suit. En banc concurrence at 1327. Nor does anything preclude SUWA's continued participation as an *amicus curiae* in the present suit.

### *II. Intervention and the Adequacy of the United States' Representation*

Finally, the majority erred in holding that the United States may not adequately represent SUWA's interests.[4] *Kane III*, 928 F.3d at 892. "Even if an applicant satisfies the other requirements of [Federal Rule of Civil Procedure] 24(a)(2), it is not entitled to intervene if its interest is adequately represented by existing parties." *San Juan Cty.*, 503 F.3d at 1203. Where the applicant for intervention has the same objective as one of the parties, a "general presumption" exists that representation is adequate. *Id.* at 1204. Notably, the majority concluded the United States may not adequately represent SUWA's interests despite two prior statements from this court to the contrary. *See San*

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[4] I would review the district court's decision on adequacy of representation for abuse of discretion. *See Kane III*, 928 F.3d at 901–02 (Tymkovich, J., dissenting) (citing *Abeyta v. City of Albuquerque*, 664 F.3d 792, 796 (10th Cir. 2011) and *Plain v. Murphy Family Farms*, 296 F.3d 975, 978 (10th Cir. 2002)). The majority relies on *City of Colorado Springs v. Climax Molybdenum Co.* in concluding this court should review the district court's decision de novo. *Kane III*, 928 F.3d at 889. In *Climax*, this court considered a consecutive motion to intervene and noted, in dicta, that if it reached the merits of the appeal, the appropriate standard of review for the district court's denial of the motion to intervene as of right would be de novo. *See* 587 F.3d 1071, 1078 (10th Cir. 2009). The court never reached the merits. Further, in that case, neither party disputed de novo review and neither party argued that the motion was properly considered a motion for reconsideration. For these reasons, I find *Climax* distinct from the present case and unpersuasive. Nonetheless, even reviewing the district court's decision de novo, I believe SUWA failed to show that the United States may not adequately represent its interests. Accordingly, I apply, *arguendo*, that standard of review here.

*Juan Cty.*, 503 F.3d at 1204–06; *Kane I*, 597 F.3d at 1134.

In *San Juan County*, the judgment of this court denying SUWA the right to intervene rested, at least in part, on the fact that the United States adequately represented SUWA's interest. *See* 503 F.3d at 1204. In *Kane I*, this court similarly held that SUWA had no right to intervene in this case because the United States adequately represented SUWA's interest. *See* 597 F.3d at 1135. Rather than adhering to these precedents, the majority departs, expressly adopting the reasoning of an opinion that gained only four judges' allegiance in *San Juan County.*[5] *See Kane III*, 928 F.3d at 893–94 (citing *San Juan Cty.*, 503 F.3d at 1226 (Ebel, J., concurring in part and dissenting in part)).

The majority rests this departure on two prongs. *First*, it attempts to bifurcate the issues of title and scope and to cast our prior precedent as relating only to title. *See Kane III*, 928 F.3d at 894 ("[T]hough SUWA and the United States had identical interests in the title determination, they do not on scope."). This provides no basis for departing from *San Juan County* and *Kane I.* Contrary to the majority's characterization of

[5] The majority opinion states that it reads the lead opinion from *San Juan County* as consistent with its conclusion that the scope of the rights-of-way was not at issue in that case. *See Kane III*, 928 F.3d at 893–94. This reading ignores clear statements to the contrary. *See San Juan Cty.*, 503 F.3d at 1171, 1206 (noting the County claimed "the right-of-way must be sufficient in scope for vehicle travel" and stating that "the pleadings define the case in a very narrow fashion [to include] the existence or non-existence of a right-of-way and its length and its breadth").

*San Juan County* as relating exclusively to title, the district court characterized the issues presented in that case as relating to "the existence or non-existence of a right-of-way *and its length and its breadth.*" *San Juan Cty.*, 503 F.3d at 1206 (emphasis added) (quoting the district court). Moreover, the majority's suggestion that the question of scope was not before the court until now is belied by the fact that, following our denial of SUWA's attempt to intervene in *Kane I*, the district court held a trial and determined the scope of the rights-of-way in question. As the majority concedes, "scope is inherent in the quiet title process," *Kane III*, 928 F.3d at 894, and as such has always been at issue in this case.

*Second*, the majority seeks to justify its departure from our precedent by referring to the change in presidential administration. Although such a change may, in certain circumstances, warrant intervention, this is not one of them. Simply put, a change in presidential administration does not affect the adjudication of property ownership. *See Kane III*, 928 F.3d at 905 (Tymkovich, J., dissenting). Unlike APA challenges concerning land *use* like those raised by the majority, a dispute over land *ownership* does not call upon the government to consider the wide array of interests the majority suggests are brought to bear and which subsequent administrations might weigh differently from prior ones. To the contrary, scope hinges exclusively on the pre-1976 usage of the roads in question. *See Kane II*, 772 F.3d at 1223 ("The scope of an R.S. 2477 right of way is limited by the established usage of the route as

of the date of the repeal of the statute."). Any adjustments to scope from the pre-1976 uses must rest on what is "reasonable and necessary . . . in the light of traditional uses to which the right-of-way was put." *Id.* at 1223. Present day interests that the United States might consider regarding the land's use are not relevant to the scope of the rights-of-way in question. Accordingly, even following the change in administration, there is no daylight between the United States' interests and those of SUWA, and the majority's conclusion that the United States will not adequately represent those interests is unfounded.[6]

The APA cases the majority cites fail to disturb this conclusion. In *WildEarth Guardians v. United States Forest Service*, this court approved intervention where the underlying issue concerned regulatory compliance with the National Environmental Policy Act in approving methane venting from a coal mine. *See* 573 F.3d 992, 994 (10th Cir. 2009). In *Utah Ass'n of Counties v. Clinton*, this court approved intervention where the underlying issue concerned compliance with NEPA and the Federal Land Policy and Management Act in

[6] SUWA speculates the United States will fail to adequately represent its interests, relying on statements from the parties that allegedly "support the notion that the new administration may be more inclined to settle" than the previous one. SUWA's Resp. to Pets. for Panel and En Banc Reh'g 5. This fails to account for the reality that the United States has not settled this case after more than two and a half years of a new administration, or explain why the parties did not further stay proceedings after the previous stay expired or why extensive discovery and depositions have continued in other pending road disputes between the parties. *See Kane III*, 928 F.3d at 905–06 (Tymkovich, J., dissenting).

the creation of the Grand Staircase Escalante National Monument. *See* 255 F.3d 1246, 1248–49, 1256 (10th Cir. 2001). In both, the government conduct at issue necessarily implicated a "broad spectrum" of interests. *WildEarth Guardians*, 573 F.3d at 996; *Utah Ass'n of Counties*, 255 F.3d at 1255–56. Neither case warrants the same result here for the simple reason that the government's defense of its title in a quiet title action does not implicate a similarly broad array of interests. Unlike government decisions concerning how to use and regulate land, defending title only implicates the government's interest in maintaining land ownership. Indeed, as the majority concedes, the United States seeks " 'retention of the maximum amount of property' and will argue for 'the smallest widths it can based on the historical evidence.' " *Kane III*, 928 F.3d at 888. This aligns the government's interests with SUWA's and suffices to show adequate representation.

As additional justifications, the majority points to the fact that "the United States opposes SUWA's intervention motion," arguing this demonstrates "[the United States] may not adequately represent SUWA's interests." *Kane III*, 928 F.3d at 895. This was squarely addressed and dismissed in *San Juan County.* 503 F.3d at 1206 ("[W]e are not inclined to infer from the Federal Defendants' opposition to intervention that they will fail to vigorously resist the claim to an R.S. 2477 right-of-way."). The majority also cites commentary from the United States implying that it might contemplate settlement in an effort to resolve the "12,000 of these claims . . . as quickly and efficiently as it can."

*Kane III*, 928 F.3d at 895. But as the majority concedes, the prospect of settlement cannot support a finding that the United States may not adequately represent the interests involved. *Id.* at 892 ("Nor is representation inadequate merely because the representative enters into a settlement, because any case, even the most vigorously defended, may culminate in a settlement.").

Accordingly, SUWA has failed to show any change in circumstances warranting a reversal of our previous conclusion that the United States adequately represents SUWA's interests in this quiet title action.

Because the panel majority's opinion is inconsistent with Supreme Court precedent regarding Article III standing and our precedent on the right to intervention, I would have granted the petitions for rehearing en banc.