Nos. 20-82 & 20-96

In The
Supreme Court of the United States

KANE COUNTY, UTAH, AND THE STATE OF UTAH,

Petitioners,

v.

UNITED STATES OF AMERICA,
SOUTHERN UTAH WILDERNESS ALLIANCE,
AND THE WILDERNESS SOCIETY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

REPLY BRIEF FOR PETITIONERS

SEAN D. REYES
Utah Attorney General
STANFORD E. PURSER
Deputy Solicitor General
ANTHONY L. RAMPTON
KATHY A.F. DAVIS
Assistant Attorneys General
OFFICE OF THE
ATTORNEY GENERAL
Utah State Capitol Complex
350 North State Street,
Suite 230
Salt Lake City, Utah 84114-2320
Telephone: (801) 366-0260
uag@agutah.gov
spurser@agutah.gov
arampton@agutah.gov
kathydavis@agutah.gov
Counsel for Petitioner State of Utah

SHAWN T. WELCH
Counsel of Record
HOLLAND & HART, LLP
222 South Main Street,
Suite 2200
Salt Lake City, Utah 84101
Telephone: (801) 799-5800
stwelch@hollandhart.com
Counsel for Petitioner Kane County, Utah

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF

SUWA's Opposition attempts to characterize the United States' and the State and county's petitions as fact-bound and radical. Opp. 19. But the effort fails upon review of the extensive array of contradictory and inconsistent Rule 24(a)(2) cases cited in the Opposition. Opp. 11-28. Even a cursory review of these cases shows that the federal appellate and district courts grant and deny intervention with few guiding principles. This Petition presents this Court with a clear opportunity to establish guidelines in a confused area of law.

The questions of whether there are any limits to an interest sufficient for intervention, and whether an existing party could ever adequately represent that interest, are directly presented in the Petition. Clearly, the courts below require this Court's guidance. One need look no further than the underlying history of this lawsuit for confirmation; on the same facts, the same law, and the same arguments, the Tenth Circuit denied SUWA's motions to intervene twice, but then granted intervention on the third attempt. There is nothing to explain the different results other than the fact that this Court has not provided guidance on the proper application of Rule 24(a)(2) intervention as of right in over 40 years.

The Opposition's central arguments—that the Court should wait for some other case or for the Rules Committee to amend Rule 24 (Opp. 18)—are not helpful. Whether a party should be allowed to intervene in

an existing lawsuit will remain a very fact-bound question and a direct circuit split would be rare given the fact-driven nature of intervention. Nevertheless, that does not justify denying review where a clear presentation of a recurring legal issue comes before the Court. It "is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Here, there is a straightforward question of whether a movant with no title to claim or defend is a proper party in a federal quiet title suit. Absent review, the follow up question will be what type and how many non-title claimants can be parties in a title suit? There are many other groups with legitimate concerns about this case, and SUWA shouldn't be the only one allowed to appear, if non-title claimants can become parties in a title suit. *See San Juan Cty. v. United States*, 503 F.3d 1163, 1210 (10th Cir. 2007) (other parties are waiting in the wings to intervene on the same legal theory that supports SUWA's intervention).

I. The Petition Should Be Granted To Confirm That An Intervenor Must Have A Legal Interest In The Lawsuit.

SUWA admits that it does not claim any title in this title suit, but it continues to assert its "environmental concern" as its interest warranting intervention. The Tenth Circuit Court held that "[h]ere, as in *San Juan County*, it is 'indisputable that SUWA's environmental concern is a legally protectable interest.' "

App. 15, citing *San Juan Cty. v. United States*, 503 F.3d at 1199. The facts and issues in *San Juan Cty.*—and SUWA's environmental concern in that case—however, were unique to that case and the Tenth Circuit judges nonetheless disagreed that SUWA had an interest. *San Juan Cty.* involved a narrow road winding through a streambed and riparian areas in Salt Creek Canyon in Canyonlands National Park. *SUWA v. Dabney*, 7 F. Supp. 2d 1205, 1207 (D. Utah 1998). Motor vehicles had broken down in the stream, spilled transmission fluids into the stream, and vehicles had also damaged archeological resources in the canyon. *Id*. Upon SUWA's lawsuit challenging a proposed management plan to limit motor vehicle travel on the Salt Creek road, the court held that continued "use of vehicles on the Salt Creek Jeep Trial beyond Peekaboo Spring is inconsistent with" the Park Service organic act. *Id*. at 1211. *See also SUWA v. Dabney*, 222 F.3d 819, 822 (10th Cir. 2000).

In response to the closure of the road, San Juan County and the State sued the United States and the Park Service to quiet title to the Salt Creek road and further sought declaratory relief requiring the Park Service to remove the gate blocking the road. *San Juan Cty. v. United States*, 503 F.3d at 1170. SUWA moved to intervene. The district court denied the motion, and then a split panel of the Tenth Circuit decided that SUWA should be allowed to intervene. *See San Juan Cty. v. United States*, 420 F.3d 1197, 1201 (10th Cir. 2005) (Ebel, J., panel majority). Ultimately, the Tenth Circuit sitting *en banc* held that SUWA could not

intervene because, at a minimum, SUWA had not overcome the presumption that the United States would adequately represent SUWA's interest in a title suit. *San Juan Cty. v. United States*, 503 F.3d 1163, 1207 (10th Cir. 2007). Under those unique circumstances, a very divided court stated that it was "indisputable that SUWA's environmental concern is a legally protectable interest. After all, it was this concern that gave it standing to bring its litigation [*Dabney*] against the NPS regarding Salt Creek Road." *Id*. at 1199 (Hartz, J. plurality).

Here, on the other hand, SUWA has not shown how it has any legally protectable "environmental concern" to justify intervention. This lawsuit does not involve a streambed road in a national park, nor is there any evidence of environmental impacts from the continued use of the roads. As stated before, this lawsuit will not result in any widening of the roads (Pet. 9 n.2), nor would SUWA have any forum or ability "to limit as much as possible the number of vehicles on the roads." Opp. 9-10. SUWA falsely argues that this lawsuit is about expanding the roads in order to implicate an environmental concern, but this assertion is not borne out by the facts.

This lawsuit involved 15 roads. *See generally Kane County (1) v. United States*, 2013 WL 1180764 (D. Utah Mar. 20, 2013). As the district court quieted title to the roads in Kane County and the State, it took no evidence about vehicle traffic, nor did it consider limiting the number of vehicles traveling the roads. *Id*. This is a title suit, and SUWA's environmental concern is not

relevant to the issue of title. "As the Supreme Court commented as far back as 1881, '[i]t does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it.'" *San Juan Cty.*, 503 F.3d at 1216 (McConnell, J., concurring), citing *Smelting Co. v. Kemp*, 104 U.S. 636, 647 (1881).

In *San Juan Cty.*, Judge McConnell wrote a six-judge concurrence commencing with the observation that this title suit "is not ordinary public law litigation. This is a case about title to real property." *San Juan Cty*., 503 F.3d at 1210 (McConnell, J., concurring). *See* Opp. 20. He went on to state that the United States' sovereign immunity would be violated by SUWA's intervention. "The Quiet Title Act is carefully limited to the adjudication of disputes among parties with competing claims to title to resolve the question of ownership." *Id*. at 1215. "This Court has said time and again that other 'interests' in government property do not suffice." *Id*. (citations omitted). "There is no reason to think Congress intended Quiet Title Act cases to become forums for consideration of broad-ranging arguments about competing environmental and recreational uses of the land, offered by public-interest groups that are strangers to the underlying title dispute." *Id*. at 1215-16.

SUWA contends that its environmental concern is that it "seeks to limit as much as possible the number of vehicles on the roads." Opp. 34 (internal quotations omitted). That is well and good, except it is irrelevant in this title suit. No fact or issue to be presented to the district court will consider the number of vehicles

traveling the road, nor can the court increase or decrease the historical and *current* travel on the roads. The underlying lawsuit adjudicated title—the length and width—of a number of roads, including the Bald Knoll road (50-foot width), the Millcreek Road (50-foot width), and the north end of the Swallow Park/Park Wash road (24-foot width). *Kane Cty. v. United States*, 2013 WL 1180764, *64-65 (D. Utah March 20, 2013). Nothing in the title decree pertaining to these roads addresses vehicle travel, and the same will apply for the single issue remaining to be decided for the three roads remaining in this lawsuit—width.

Simply stated, whatever SUWA may want to argue about the environment will not be heard by the district court when it determines the width of the three roads on remand. Why then at this stage of the litigation must SUWA be a party in this title case, where it claims no title?

II. The United States Adequately Represents Its Title Which Is The Single Interest In This Lawsuit.

Rule 24(a)(2) does not allow intervention if the movant's interest is "adequately" represented by an existing party. This Court has not substantively addressed the issue of adequate representation in almost 50 years. *See Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972). In *Trbovich*, the Secretary of Labor sued to set aside an election of union officials. *Id*. at 529. This Court allowed a union member, the member

who initiated the protest, to intervene because the Secretary had a "duty to serve two distinct interests." *Id.* at 538. It was the differing interests that made it impossible for the Secretary to adequately represent the member's interests. Moreover, the Court allowed intervention "so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint." *Id.* at 538.

There are no differing interests in this lawsuit, as the United States is solely defending its title. And clearly, SUWA's intervention to defend an "environmental concern" is an issue that is not presented in the complaint.

Normally, if the "party's interests are 'identical,' we presume adequate representation." *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986). Here, the Tenth Circuit decided that if the representative of the proposed intervenor's interest is "a governmental entity" the presumption of adequate representation 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." App. 25, quoting *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001). *Utah Ass'n of Ctys.*, and the cases upon which it relies, involved lawsuits where executive actions were being challenged by a range of interest groups. This lawsuit, on the other hand, involves the single issue of title—the "length and breadth" of a road. *San Juan Cty.*, 503 F.3d at 1171.

The Tenth Circuit's test cannot be squared with the standards employed by other circuits. For example, the First Circuit presumes adequate representation "when a would-be intervenor's objective aligns seamlessly with that of an existing party. In such a situation, a rebuttable presumption of adequate representation attaches." *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1st Cir. 2020). To overcome the presumption, a would-be intervenor must "put forward 'a strong affirmative showing' that" an existing party will not adequately represent the interest. *Id*. "Such a showing would have had to consist of something more than speculation as to the purported inadequacy of representation." *Id*. (citation and quotation marks omitted).

SUWA is wrong to argue that the review sought in this matter would exclude "[b]eneficiaries of government policies or actions who intervene as defendants when those policies or actions are challenged by others." Opp. 29. When an agency engages in rulemaking under the Administrative Procedures Act (APA), there are often many legal interests implicated by the final rule and Congress has created a right of judicial review. *See* 5 U.S.C. § 702. In such proceedings it is common for many interested parties, of all kinds, to intervene to protect their interests. Kane County has filed APA cases and did not oppose SUWA's motion to intervene. *See Kane Cty. Utah v. Salazar*, 562 F.3d 1077, 1083 (10th Cir. 2009). An APA case often involves a range of interests and in that circumstance the

government cannot be expected to adequately represent all of the interests implicated.

This lawsuit, on the other hand, does not involve a range of competing interests—it solely involves the width of three roads. United States has proven that it is defending its title by the fact that it appealed the district court's findings regarding the width of the three roads. The only reason this lawsuit was remanded is because the United States is vigorously defending its title. Additionally, there is nothing in this lawsuit that involves Trump Administration policies or the boundaries of the Grand Staircase-Escalante National Monument. Opp. at 8. Neither Trump Administration policies nor the changing boundaries of the Monument have anything to do with the existing width of the three roads.

III. SUWA's Intervention Will Cause Unnecessary Delays and Needlessly Consume Judicial Resources.

As SUWA notes, it is already a permissive intervenor in the main R.S. 2477 cases, and it is demanding to become an intervenor of right based upon the Tenth Circuit's decision below. Opp. 23. While SUWA contends its impact on the cases has been exaggerated by the Government, the facts show otherwise.

Across several years, SUWA was the sole cause of a multitude of procedural motions and hearings. SUWA fielded "at least 18 lawyers from national and international firms," as well as local attorneys.

Memorandum Decision and Order Re SUWA's Participation, p. 22, No. 2:10-cv-01073 CW (D. Utah September 5, 2019). As it stated, "[w]e intend to litigate [the R.S. 2477 cases] aggressively using every resource available to us." *Id*. For a time, the parties were having procedural hearings before the district court about every six weeks.

After years of this conduct, the district court noted that SUWA had "bristled over [litigation] restrictions and sought to thwart them so it could take the lead and act as a full party." *Id*. at 23. "In truth, SUWA has filed about four times as many motions as any other party." *Id*. at 30. Finding that SUWA had routinely circumvented the court's orders and caused prejudice to the parties, it strictly limited SUWA's role in the case. *Id*. at 36-37.

These problems exist because SUWA has a specific environmental, non-title agenda to pursue, and not a legal claim or interest in title. The quiet title suits are complicated enough and there is no legal role for SUWA to play in the proceedings.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

SEAN D. REYES
Utah Attorney General
STANFORD E. PURSER
Deputy Solicitor General
ANTHONY L. RAMPTON
KATHY A.F. DAVIS
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, Utah 84114-2320
Telephone: (801) 366-0260
uag@agutah.gov
spurser@agutah.gov
arampton@agutah.gov
kathydavis@agutah.gov
Counsel for Petitioner
State of Utah

SHAWN T. WELCH
Counsel of Record
HOLLAND & HART, LLP
222 South Main Street, Suite 2200
Salt Lake City, Utah 84101
Telephone: (801) 799-5800
stwelch@hollandhart.com
Counsel for Petitioner
Kane County, Utah

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