No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KANE COUNTY, UTAH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME 1)

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-4122

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

[Filed: June 25, 2019]

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

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

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 deter-

minations 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 (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*, 285 P. 646, 648 (Utah 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 In 1976, Congress enacted the Federal Land Policy and Management Act, which repealed R.S. 2477, but preserved already-existing rights-of-way. 43 U.S.C. § 1769(a).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 "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

[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.

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

[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

that (1) it had subject-matter jurisdiction under the Quiet Title Act over all the disputed roads, and that (2) Kane County and the 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*

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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).

[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.

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 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]

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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.*

the right-of-way beyond what is reasonable and 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 ruling. Ten days later, the parties jointly moved for a four-month stay, stating that they had begun settlement discussions

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[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*, 136 S. Ct. 318 (2015); *Kane Cty., Utah v. United States*, 136 S. Ct. 319 (2015).

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 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

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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 factfinding 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 National 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).

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 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

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

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 (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).

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).

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

[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.

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.*, 137 S. Ct. 1645, 1648 (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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[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 4-5. But language to 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 (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. 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

Citing *Town of Chester*,[12] 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.[13] *See* United States' Resp. Br. at 22, 32; Oral Arg., at 18:30.

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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).

[13] Contrary to the dissent's view, *see* Dissenting Op. at 3-4, 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.*

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) 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 (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 (1992), and "[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or

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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.").

there is a substantial risk that the harm will occur," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (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 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.

II. Standard of Review

Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, a nonparty 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

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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).

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.").

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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.

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.

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*

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[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 (10th Cir. 2002), contain stray comments characterizing a successive motion for intervention as a motion to reconsider. *See* Dissenting Op. at 12. 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).

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 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 claims an interest relating to the property or transaction

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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.

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 (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

[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.

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.

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 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.

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[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.

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 (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

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

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*, we remanded for the district court to reexamine 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 F.3d at 1229

[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

(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 (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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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. *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 (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. 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

[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).

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]

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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

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 (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."). 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. 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*

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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.

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.

[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.

18-4122, *Kane County v. United States*

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.*, 137

S. Ct. 1645, 1651 (2017); *Hollingsworth v. Perry*, 570 U.S. 693, 704 (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.*, 134 S. Ct. 1377, 1386 (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 (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. Three years later, the Supreme Court unan-

imously 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* slip op. at 12. 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 28, with respect to the scope of Kane County's asserted rights-of-way. *See also id.* at 26 ("SUWA is focused on pursuing the narrowest scope [of road width], but many of the stakeholders involved may want wider roads. The United 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]

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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 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 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.

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).

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 (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 (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 (2013) (cleaned up); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (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; *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. 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 (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*, 137 S. Ct. 1678, 1689 (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 (1975)).[2]

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

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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.*, 135 S. Ct. 1378, 1383-84 (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.

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 (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).

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[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 (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 (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.

Because SUWA's claim to relief rests "on the legal rights or interests of third parties," *Kowalski*, 543 U.S. at 129, 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 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. 2011), to argue that anything but the narrowest title determination will impair its environmental interest, and the court appears to adopt this reasoning, *see* slip op. at 20-21. 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.

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[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 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).

Quieting title does not bring any new rights into existence or require evaluation of the public interest, it merely clarifies already existing 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 at 1204. This presumption applies "when the government

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[5] 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").

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

[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

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 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

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States' decision to relinquish parts of the Monument is not a possible remedy.

"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).

* * * *

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.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Case No. 2:08-cv-315-CW

KANE COUNTY, UTAH; AND STATE OF UTAH,
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Aug. 21, 2018

MEMORANDUM DECISION & ORDER

District Judge CLARK WADDOUPS

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 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

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[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."). 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.

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

DATED this 21st day of Aug., 2018.

BY THE COURT:

/s/ CLARK WADDOUPS
CLARK WADDOUPS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 13-4108, 13-4109 & 13-4110

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

SIERRA CLUB; GRAND CANYON TRUST; NATIONAL PARKS CONSERVATION ASSOCIATION; SOUTHERN UTAH WILDERNESS ALLIANCE; THE WILDERNESS SOCIETY, AMICI CURIAE

[Filed: Dec. 2, 2014]

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

Before **KELLY**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

KELLY, Circuit Judge.

This case involves a dispute between Kane County, Utah (joined by the State of Utah as intervenors) and the United States over the existence and breadth of the County's rights-of-way on federally owned land in Southern Utah. We previously affirmed the denial of intervention to the Southern Utah Wilderness Alliance, the Wilderness Society and the Sierra Club. Kane Cnty. v. United States, 597 F.3d 1129 (10th Cir. 2010). On March 20, 2013, the district court issued two final orders, see Kane Cnty. v. United States, 934 F. Supp. 2d 1344 (D. Utah 2013) [hereinafter Kane I]; Kane Cnty. v. United States, No. 2:08-cv-00315, 2013 WL 1180764 (D. Utah Mar. 20, 2013) [hereinafter Kane II], both of which are challenged in this appeal and cross-appeal. Our jurisdiction arises pursuant to 28 U.S.C. § 1291. We consider five issues involving the application of the Quiet Title Act, 28 U.S.C. § 2409a, and Section 8 of the Mining Act of 1866, more commonly known as "Revised Statute (R.S.) 2477." We affirm in part, reverse in part, and remand.

Background

In April of 2008, Kane County brought an action under the Quiet Title Act (QTA), 28 U.S.C. § 2409a, to quiet title to five roads or road segments. It later amended its complaint to cover a total of fifteen roads or road segments. The QTA supplies a limited waiver of sovereign immunity for the settlement of property claims against the United States.

Kane County asserts rights-of-way over these roads pursuant to R.S. 2477, which states that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." An

Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932), repealed by Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793. R.S. 2477 was "a standing offer of a free right of way over the public domain." San Juan Cnty. v. United States, 754 F.3d 787, 791 (10th Cir. 2014) (quoting S. Utah Wilderness Alliance (SUWA) v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005)). Though R.S. 2477 was repealed in 1976 by the FLPMA, it preserved existing rights-of-way. 43 U.S.C. 1769(a).

On February 26, 2010, the State of Utah filed a motion to intervene as co-plaintiff and the motion was granted. In August 2011, the district court held a nine-day bench trial that included the testimony of 26 witnesses and over 160 exhibits. On March 20, 2013, the district court issued two orders. In the first order, the district court held it had subject matter jurisdiction under the QTA over each of the fifteen roads at issue. See Kane I, 934 F. Supp. 2d 1344. In the second order, the district court made findings of fact and addressed the merits of Kane County and Utah's claims, finding they had proven R.S. 2477 rights-of-way on twelve of the fifteen roads at issue and setting proper widths for the rights-of-way. See Kane II, 2013 WL 1180764. Both orders are challenged in this appeal.

Plaintiffs-Appellants and Cross-Appellees Kane County and Utah challenge two of the district court's determinations. First, they argue the district court erred in finding that Public Water Reserve 107 reserved from the operation of R.S. 2477 two parcels of lands crossed by Swallow Park/Park Wash Road ("Swallow

Park Road"). Second, they contend the district court erred in requiring that R.S. 2477 rights-of-way be proven against the United States by clear and convincing evidence.

Defendant-Appellee and Cross-Appellant United States also raises two issues. First, it contends the district court lacked jurisdiction over Kane County's claims regarding the Sand Dunes, Hancock and four Cave Lakes roads because of the absence of a "disputed title to real property in which the United States claims an interest," 28 U.S.C. § 2409a(a), a prerequisite to federal court jurisdiction under the QTA. Second, the United States contends the district court erred in determining the widths of Plaintiffs' rights-of-way on Swallow Park Road, North Swag Road, and Skutumpah Road.

Additionally, amici Southern Utah Wilderness Alliance (SUWA), the Wilderness Society and the Sierra Club (collectively "amici") contend the district court lacked jurisdiction over Kane County's R.S. 2477 claim to North Swag Road because the QTA's limitations period had already run. This issue pertains to subject matter jurisdiction, a matter "essential to this court's review," which we would address "without regard to whether the parties dispute its existence." Elliot Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1104 (10th Cir. 2005). Accordingly, we address it alongside the jurisdictional arguments raised by the United States.

The issues before this court thus implicate nine roads: Sand Dunes Road, Hancock Road, the four Cave Lakes roads (denominated as K1070, K1075, K1087 and K1088), Swallow Park Road, North Swag Road and a portion of Skutumpah Road. The facts regarding these roads are discussed as they are pertinent to each issue.

Discussion

A. Quiet Title Act Jurisdiction

The United States and amici contend the district court lacked subject matter jurisdiction over certain of the QTA claims. The United States contends Kane County brought claims to roads on which no "disputed title" existed and amici contend Kane County brought claims to roads on which the QTA limitations period had run. The district court rejected these arguments, and we review its determinations de novo. See Rio Grande Silvery Minnow v. Bureau of Reclamation, 599 F.3d 1165, 1175 (10th Cir. 2010).

The United States cannot be sued absent a waiver of sovereign immunity. See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 280 (1983). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969). The QTA provides such a waiver:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a *disputed title* to real property in which the United States *claims an interest*.

28 U.S.C. 2409a(a) (emphasis added). The QTA provides the "exclusive means by which adverse claimants [can] challenge the United States' title to real property." Block, 461 U.S. at 286. District courts are granted jurisdiction over § 2409a suits under 28 U.S.C. § 1346(f).

Thus, for a court to have jurisdiction over a QTA claim, the plaintiff must establish that: (1) the United States "claims an interest" in the property at issue; and (2) title to the property is "disputed." See Leisnoi, Inc.

v. United States (Leisnoi II), 267 F.3d 1019, 1023 (9th Cir. 2001).[1] The district court found these two elements satisfied as to each of the fifteen roads at issue. The United States argues that the grounds on which the court found "disputed title" to Sand Dunes, Hancock and the four Cave Lakes roads were insufficient under § 2409a(a).

The issue of what is required to satisfy the QTA's "disputed title" requirement is one of first impression in this circuit. In interpreting § 2409a(a), we begin with the established principle that waivers of sovereign immunity are to be read narrowly and conditions on the waiver are to be "strictly observed." Block, 461 U.S. at 287; see also Mills v. United States, 742 F.3d 400, 405 (9th Cir. 2014) ("In construing the scope of the QTA's waiver, we have read narrowly the requirement that the title at issue be 'disputed.'").

The parties rely on a pair of Ninth Circuit cases analyzing the scope of § 2409a(a)'s waiver of sovereign immunity. In Alaska v. United States, Alaska's title to the Kandik, Nation and Black rivers depended upon whether the rivers were navigable at the date Alaska obtained statehood. 201 F.3d 1154, 1156-57 (9th Cir. 2000). QTA jurisdiction thus hinged on whether the United

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[1] Though some courts appear to combine the two QTA elements into one, see, e.g., Alaska v. United States, 201 F.3d 1154, 1160 (9th Cir. 2000) (analyzing the issue as whether the United States "claim[ed] an interest"); Mills v. United States, 742 F.3d 400, 405 (9th Cir. 2014) (relying on Alaska but analyzing the issue simply as whether a "disputed title" exists), most courts appear to follow Leisnoi II and analyze the elements separately, as did the district court. See, e.g., Mich. Prop. Ventures, LLC v. United States, No. 14-10215, 2014 WL 2895485, at *4-6 (E.D. Mich. June 26, 2014).

States had claimed an interest in the rivers by asserting they were not navigable at the time of statehood. Before the district court, the United States refused to admit or deny Alaska's allegations that the rivers were navigable at statehood. Despite the United States' failure to formally claim an interest in the case at hand, the Ninth Circuit found it had claimed an interest in the Kandik and Nation rivers. The court relied upon the Unites States' previous assertion before an administrative law judge that the rivers were not navigable at statehood, explaining that this past assertion created a "present cloud on the state's title." Id. The court expressed a preference against allowing potential federal claims to "lurk over the shoulder of state officials as they try to implement a coherent management plan" for the state's waterways. Id. at 1161. However, the court found no QTA jurisdiction over the Black River because the United States never "expressly asserted a claim" to it. Id. at 1164.

Though Alaska dealt with whether the United States "claimed an interest" in the rivers, other Ninth Circuit cases have applied this "cloud on title" standard to the "disputed title" element of § 2409a(a). See Leisnoi II, 267 F.3d at 1024 (holding the "disputed title" requirement of the QTA can be satisfied by a third-party's assertion of an interest of the United States that "clouds the plaintiff's title"); Leisnoi, Inc. v. United States (Leisnoi I), 170 F.3d 1188, 1192 (9th Cir. 1999). However, more recently in Mills, the Ninth Circuit did not reference the "cloud on title" standard and emphasized that the "disputed title" requirement must be "read narrowly." 742 F.3d at 405. In Mills, a miner sought access to a mine site over an R.S. 2477 right-of-way and brought suit under the QTA. Id. at 403-05. The court

found no "disputed title" where land management agency officials had previously denied the plaintiff's petitions for a right-of-way on the grounds that they lacked the legal authority to grant the petition. Id. at 405-06. The court explained that the United States had not "expressly dispute[d]" the plaintiff's title, nor had it "taken an action that implicitly disputes" the title. Id.

To the extent the Ninth Circuit still utilizes a "cloud on title" standard, we would reject it as incompatible with the rule that conditions on a waiver of sovereign immunity are to be specifically observed. See Block, 461 U.S. at 287. The "cloud on title" standard provides little guidance to parties as to what constitutes a title dispute and could lead federal courts to issue advisory opinions. Instead, we hold that to satisfy the "disputed title" element of the QTA, a plaintiff must show that the United States has either expressly disputed title or taken action that implicitly disputes it.

Under this standard, a plaintiff need not show the United States took direct action to close or deny access to a road—indirect action or assertions that actually conflict with a plaintiff's title will suffice. Nor is the United States shielded by sovereign immunity where it previously disputed a plaintiff's title but does not do so presently. Cf. Alaska, 201 F.3d at 1162. Thus, concerns about potential claims "lurk[ing] over the shoulder of state officials" are ameliorated. Id. at 1161. However, actions of the United States that merely produce some ambiguity regarding a plaintiff's title are insufficient to constitute "disputed title." This accords with both the purpose of the QTA—allowing parties to settle disputes with the United States over land—and the

principle that waivers of sovereign immunity are construed narrowly.

We now turn to each of the roads at issue in this appeal.

1. Sand Dunes and Hancock Roads

Sand Dunes Road is a 20-mile road running from the Utah-Arizona border to Utah State Highway 89. Near Sand Dunes is Hancock Road, a paved, two-lane road roughly ten miles in length. Both roads fall within the land administered by the Kanab Field Office, a branch of the Bureau of Land Management (BLM).

On October 31, 2008, the Kanab Field Office released the Kanab Field Office Management Plan ("the Plan"). Kane I, 934 F. Supp. 2d at 1353. The Plan provides guidance for the management of roughly 554,000 acres of land administered by the BLM and was based on "a complete route inventory in 2005 and 2006." Id. It specifies that "[n]atural and cultural resource protection is . . . accomplished by limiting motorized travel to the routes designated." Id. However, the Plan explicitly states it "*does not* affect valid existing rights" and "*does not* adjudicate . . . or otherwise determine the validity of claimed rights-of- way." Id. (emphasis added).

Map 9 of the Plan identifies areas that are open to cross-country, motorized vehicle use, closed to such use, or open only on designated routes. Hancock and Sand Dunes roads fall in an area where off-highway vehicle use is "Limited to Designated Open Roads and Trails." Id. Map 10 of the Plan shows which routes in the designated area are open, closed, or limited for motor vehi-

cle use. Hancock and Sand Dunes roads are not identified in Map 10. On January 30, 2009, after Kane County filed its amended complaint to include these roads, BLM published additional maps on its website identifying Hancock and Sand Dunes roads as "Class 3 primary roads," a term used to denote major thoroughfares. The changes to the maps were not the product of a formal amendment process. Id.

The district court found that the Plan's omission of Hancock and Sand Dunes roads from the initial maps had the practical effect of closing the roads. Id. at 1357. Because the republished maps were not the product of a formal amendment process, the court held that an "ambiguity" existed as to the legal status of the roads, creating a "cloud on title" sufficient for jurisdiction under § 2409a(a). Id. at 1354, 1358. We disagree.

The effect of the Plan's omission of Sand Dunes and Hancock roads is at best ambiguous and insufficient to create a disputed title under § 2409a(a). The Plan *explicitly* declared it did not adjudicate or affect rights-of-way. Further, though the Plan marked certain roads as closed, Hancock and Sand Dunes were not marked as closed; they simply were not marked at all. Though a provision of the Plan suggested travel was limited to designated routes, the effect of this provision is unclear, as the United States took no action to limit travel to such routes. Regardless of whether the United States was entitled to clarify the original maps with additional maps online, see id. at 1357-58, the original maps did not amount to a disputed title. The district court was correct in concluding an "ambiguity exist[ed] regarding the legal status of the roads," id. at 1354; however, this ambiguity

is insufficient to constitute a "disputed title" under § 2409a(a).

Kane County relies upon several other grounds for finding a "disputed title" to the Sand Dunes, Hancock and four Cave Lakes roads that were not addressed by the district court. Kane Reply Br. 9-17. The County does not explain how any of these grounds create a "disputed title" to Sand Dunes, Hancock or the Cave Lakes roads specifically, and so we find its argument without merit. Thus, we reverse the district court and find it had no jurisdiction over the QTA claims to Sand Dunes and Hancock roads.

2. The Four Cave Lakes Roads

a. The United States' Answer

The Cave Lakes roads (denominated as K1070, K1075, K1087 and K1088) are four short roads in southwestern Kane County crossing BLM-administered land. All four were designated as "open" under the Kanab Field Plan. Kane I, 934 F. Supp. 2d at 1354. Paragraph 29 of Kane County's amended complaint stated: "After 1866 and prior to the repeal of R.S. 2477 on October 21, 1976, Kane County, by and on behalf of the public, accepted R.S. 2477 rights-of-way for . . . the Cave Lakes roads." JT App. 41. The United States' answer as to this paragraph stated: "The allegations . . . are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is required, the United States lacks sufficient information to form a belief as to the truth of the allegations." Id. at 113. Under Fed. R. Civ. P. 8(b)(5), this response is treated as a denial. The district court found this denial of the allegations created a "disputed title" sufficient for

jurisdiction under the QTA. Kane I, 934 F. Supp. 2d at 1358. We disagree.

The district court likened the United States' answer to Alaska, where the Ninth Circuit held that a past claim of interest before an administrative law judge as to the Nation and Kandik Rivers amounted to a present "cloud" on the plaintiff's title. 201 F.3d at 1162. However, Alaska itself found no jurisdiction over the QTA claim to the Black River where, as here, the United States refused to admit or deny allegations of the river's navigability at the pleading stage because the allegations "consist[ed] of conclusions of law not requiring an answer." Id. at 1163-65. Alaska thus suggests that a failure to admit allegations cannot alone suffice to show a "disputed title" under § 2409a(a). Though a disclaimer of title by the United States does operate to remove the jurisdiction of the court under the QTA, see 28 U.S.C. § 2409a(e), a disclaimer is not necessary for the United States to challenge jurisdiction under § 2409a(a). See Leisnoi I, 170 F.3d at 1192 ("Subsection (a) is the one that confers jurisdiction. . . . Nothing in subsection (e) qualifies those requirements."). Moreover, as a practical matter, requiring the United States to either admit allegations or waive sovereign immunity under § 2409a(a) would place a tremendous and unfair burden upon it at the pleading stage. Thus, we conclude the United States' answer is insufficient to constitute a "disputed title" under § 2409a(a).

b. The United States' Grant of Title V Permits

As to three of the Cave Lakes roads (K1070, K1075 and K1087), the district court found that the BLM's grant of Title V permits to private entities provided an additional ground for "disputed title" under § 2409a(a).

On July 25, 2008, the BLM issued Title V permits to a private entity to use these three roads. Supp. App. 337-55. The Title V permits grant the right to "construct, operate, maintain, and terminate an access road for the purpose of accessing private property on public lands." Id. at 337. The permits state that roads must be "surfaced to specifications set by Kane County for a subdivision road and to Kane County standards for subdivision roads with a travel surface of 28 feet." Id. at 338. The permits are "not intended to extinguish or limit any R.S. 2477 right-of-way," and if an R.S. 2477 right-of-way was found by a court or the Secretary of the Interior, the permit "would be superseded thereby." Id. The district court held these permits "conflict[ed] with Kane County's ability to manage its alleged rights-of-way" and thus amounted to a dispute of title under 2409a(a). Kane I, 934 F. Supp. 2d at 1358. We disagree.

Nothing about the grant of Title V permits to third parties expressly or implicitly disputes Kane County's right-of-way. "Easements and servient estates can (and usually do) peaceably coexist." George v. United States, 672 F.3d 942, 947 (10th Cir. 2012). Here, the permits require that the roads be maintained in accordance with Kane County standards. Further, like the Kanab Field Plan, the Title V permits state they do not affect R.S. 2477 rights-of-way; even more, they *explicitly* state they are "superseded" by any R.S. 2477 rights-of-way. The permits, if anything, seem a deliberate attempt *not* to dispute Kane County's title.

To be sure, "owners of the dominant and servient estates 'must exercise [their] rights so as not unreasonably to interfere with the other.'" S. Utah Wilderness

Alliance (SUWA) v. Bureau of Land Mgmt., 425 F.3d 735, 746 (10th Cir. 2005) (quoting Big Cottonwood Tanner Ditch Co. v. Moyle, 174 P.2d 148, 158 (Utah 1946)). But, Kane County has produced no evidence as to how the permits interfered with any development plans. Absent such evidence, we must conclude that the Title V permits do not create a "disputed title" under § 2409a(a).

Thus, as to all four of the Cave Lakes Roads (K1070, K1075, K1087 and K1088) we reverse the district court's finding of jurisdiction under the QTA.

3. North Swag Road - QTA Limitations Period

Amici contend that the district court lacked jurisdiction over Plaintiffs' R.S. 2477 claim to North Swag Road because the QTA's limitations period had already run. The district court found that the limitations periods had not run, Kane I, 934 F. Supp. 2d at 1360-64, and the United States has not challenged this finding on appeal. At an earlier stage of litigation, the United States in fact conceded the QTA limitations period had not run. See Kane Cnty. v. United States, No. 2:08-CV-00315, 2011 WL 2489819, at *7 (D. Utah June 21, 2011). Nevertheless, the QTA's limitations period is a jurisdictional bar, see Rio Grande Silvery Minnow, 599 F.3d at 1175-76, and thus we address it.

As discussed above, the QTA provides the exclusive means by which claimants can challenge the United States' title to real property. But, "what the QTA gives it often proceeds to take away." George, 672 F.3d at 944. The QTA provides two limitations provisions, one for non-states and one for states. Section 2409a(g), applicable to non-states including counties, provides:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g). Thus, the twelve-year limitations period for non-states is triggered when a party knows or should know of a claim of the United States.

As to states, the QTA provides that for land on which the United States has made "substantial improvements" or has "conducted substantial activities pursuant to a management plan," actions are barred unless commenced "within twelve years after the date the State received notice of the Federal claims to the lands." Id. § 2409a(i). "Notice" for states must be either by public communications "sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands" or "by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious." Id. § 2409a(k)(1)-(2). Both the 2409a(g) and 2409a(i) standards are relevant here, as amici argue the limitations periods ran on both Kane County and Utah's QTA claims.

In interpreting the QTA's limitations provisions, we begin again with the familiar proposition that waivers of sovereign immunity are construed narrowly and conditions upon the waiver strictly observed. Block, 461 U.S. at 287. This court has held that the trigger for starting the QTA limitations period is an "exceedingly light one." George, 672 F.3d at 944. A "range war" is not required, and plaintiffs cannot wait until the United

States' claims to title "crystallize into well-defined and open disagreements." Id. at 946-47 (quoting Rio Grande Silvery Minnow, 599 F.3d at 1188). Concrete action by the United States is not required; "[a]ll that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." Knapp v. United States, 636 F.2d 279, 283 (10th Cir. 1980). Thus, though "[k]nowledge of the claim's full contours" is unnecessary, id., the plaintiff must be on notice of an *adverse* interest asserted by the government. George, 672 F.3d at 946.

This court recently explained in San Juan County v. United States that in order to trigger the QTA limitations period against a party claiming an R.S. 2477 right-of-way, the United States must claim "exclusive control" of a road. 754 F.3d 787, 793 (10th Cir. 2014); see also McFarland v. Norton, 425 F.3d 724, 727 (9th Cir. 2005) (requiring an exclusive claim to trigger the QTA limitations period against a party claiming a right-of-way); Michel v. United States, 65 F.3d 130, 132 (9th Cir. 1995) (same). As a public right-of-way can generally "peaceably coexist" with an underlying ownership interest, see George, 672 F.3d at 947, the United States must provide a county or state with "sufficient notice of the United States' claim of a right to exclude the public." San Juan Cnty., 754 F.3d at 794.

Amici contend that two events triggered the QTA limitations periods: (1) the BLM's 1980 designation of the Paria-Hackberry Wilderness Study Area and publication of this designation in the Federal Register; and (2) a 1991 meeting of the Kane County Commissioner with BLM representatives to discuss the procedures necessary for obtaining recognition of R.S. 2477 rights-

of-way. The district court found these events insufficient to trigger the QTA limitations period, and we review its determinations de novo. See Rio Grande Silvery Minnow, 599 F.3d at 1175.

a. The 1980 Designation of the Paria-Hackberry WSA

In 1976, as part of a "statutory sea change," Congress passed the Federal Land Policy and Management Act (FLPMA), initiating a "conservation and preservation" approach to federal land management. SUWA, 425 F.3d at 741. Pursuant to the FLPMA, the Secretary of the Interior was directed to conduct an inventory of "those roadless areas of five thousand acres or more" to determine which areas had wilderness characteristics as defined by the Wilderness Act. 43 U.S.C. § 1782(a). An area of wilderness was defined to mean "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation." 16 U.S.C. § 1131(c).

On November 14, 1980, the BLM published its Final Intensive Inventory Decision for Utah in the Federal Register. See 45 Fed. Reg. 75,602 (Nov. 14, 1980). This inventory designated Paria-Hackberry, which encompassed North Swag Road, as a Wilderness Study Area (WSA). Upon designation of land as a WSA, the Secretary of the Interior is directed to manage such lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness" and to "take any action required to prevent unnecessary or undue degradation of the lands and their resources." 43 U.S.C. § 1782(c). This standard requires the BLM to "ensure that an area's existing wilderness values are not de-

graded" in a manner that might threaten the WSA's designation as protected wilderness. Interim Management Policy and Guidelines for Land Under Wilderness Review (IMP), 44 Fed. Reg. 72,014 (Dec. 12, 1979).

Though the FLPMA applies to "roadless" areas, a "road" for purposes of the Wilderness Act is not coterminous with a "road" under R.S. 2477. The same year the BLM designated the Paria-Hackberry WSA, the BLM Director for Utah issued a memorandum stating the following:

> The wilderness inventory process uses a definition of a road that is distinct from the definition of "public" road contemplated by R.S. 2477 (43 USC 932) and is a definition for inventory purposes only, not for establishing rights of counties, etc. A determination that an area should not be excluded from wilderness review because the area does not have any "roads" as defined in the Bluebook is not a determination that a road is or is not a "public" road. This is a factual determination that does not relate to wilderness. . . .

Instruction Memorandum No. UT '80-240 (Mar. 6, 1980), JT App. 2300-01. A subsequent nationwide BLM memorandum stated that where WSAs overlap with R.S. 2477 rights-of-way, "the WSA/wilderness designation is subject to the terms and conditions of the pre-existing R/W grant." Instructional Memorandum No. 90-589 (Aug. 15, 1990), JT App. 2295; see also id. at 2296 (noting that R.S. 2477 rights-of-way "may in fact exist within a WSA"); IMP, 44 Fed. Reg. 72,015 (WSAs "shall be subject to valid existing rights"). Moreover, an opinion from the Secretary of the Interior shortly after the Paria-Hackberry WSA designation explained that valid existing rights, including rights-of-way, were excepted

from the non-impairment requirements of 43 U.S.C. § 1782(c). See United States Dep't of the Interior Solicitor's Opinion M-36910, 88 I.D. 909, 1981 WL 29226 (Oct. 5, 1981). In light of this evidence, the district court found that the Paria-Hackberry designation did not constitute an adverse claim to North Swag and was thus insufficient to trigger the QTA limitations period.

Amici argue the designation of Paria-Hackberry as a WSA and publication of this designation were sufficient to give Kane County and Utah notice of the claim of the United States. They contend this claim was adverse to the rights of Kane County and Utah because the WSA designation meant that the land was to remain "roadless" and imposed upon the BLM a duty to manage the roads on a non-impairment standard that conflicted with any claimed R.S. 2477 rights-of-way. SUWA Br. 22-31.

Amici are correct that publishing an interest in the Federal Register is sufficient to give notice to affected parties. See George, 672 F.3d at 944 (quoting 44 U.S.C. § 1507). However, as the district court recognized, publication in the Federal Register is sufficient notice to trigger the limitations period only where the published notice conflicts with a plaintiff's interest. Kane I, 934 F. Supp. 2d at 1362. Thus, if the published interest does not amount to a claim that a plaintiff lacks R.S. 2477 rights-of-way within a WSA, the limitations period is not triggered. As San Juan County explained, in the context of R.S. 2477 claims, a published claim by the United States must amount to a claim of "exclusive control" to trigger the QTA limitations period. 754 F.3d at 794. Thus, the determinative issue is whether the Paria-Hackberry designation amounted to a claim of exclusive

control or whether it permitted the United States' ownership interest and the Plaintiffs' right-of-way to "peaceably coexist." George, 672 F.3d at 947.

We conclude the Paria-Hackberry designation was insufficient to trigger QTA limitations periods against Kane County and Utah. The fact that the Wilderness Act covers "roadless" areas is inapposite, as the definitions for roads under the Wilderness Act and R.S. 2477 are not the same. Nor is the non-impairment standard by which the BLM was to manage the WSA sufficient to amount to a claim to North Swag road. As a preliminary matter, the Department of the Interior itself did not believe the non-impairment standard served to limit valid existing rights, including rights-of-way. See Solicitor's Opinion M-36910, supra. Even if the non-impairment standard did apply to R.S. 2477 rights-of-way, amici have not shown how this would amount to a claim by the United States of "exclusive control" over North Swag.

Several other BLM memoranda, both contemporaneous with and subsequent to the 1980 wilderness designation, strongly suggest that wilderness designations do not preclude the recognition of R.S. 2477 rights-of-way. The 1980 Instruction Memorandum issued by the Utah BLM Director, which preceded the Paria-Hackberry wilderness designation, establishes that the BLM did not believe wilderness designations rendered an area "roadless" for R.S. 2477 purposes. The 1990 BLM Memorandum stated with even greater clarity that wilderness designations are "subject to the terms and conditions" of pre-existing rights-of-way. JT App. 2295. Amici cast these BLM documents as an attempt to "un-

ring the bell" that the 1980 Paria-Hackberry designation "chimed," especially given their status as informal agency pronouncements. See SUWA Br. 29; SUWA Reply Br. 16 (citing Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 741-42 (8th Cir. 2001); Kingman Reef Atoll Invs., LLC v. United States, 541 F.3d 1189, 1200 (9th Cir. 2008)). But unlike the cases amici cite, the BLM memoranda are not meant to unring the bell, but to show the bell never rang in the first place. If the BLM did not believe wilderness designations conflicted with rights-of-way within the land, it would be strange indeed to declare that Kane County or Utah should have.

This court's analysis in San Juan County provides further support for our decision. There, San Juan County and Utah brought several QTA claims against the United States, who argued that the § 2409a limitations periods had run. As to the County's claim, the court rejected the United States' contention that the closures of two different segments of the same road amounted to an adverse claim to the road at issue. San Juan Cnty., 754 F.3d at 793-94. More pertinent here, the court explained that as to Utah's claim, the United States failed to show that either the road closures or "a variety of other park management activities," including "the National Park Service's 1970 recommendation that the upper canyon be designated as wilderness," amounted to notice of a claim *adverse* to Utah's claimed right-of-way. Id. at 796. Because these management activities left the road "fully accessible to the public," they did not suffice to trigger the limitations period.[2] Id.

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[2] We read San Juan County to be in line with our precedent holding that a "range war" or physical actions to "enforce" a claim are unnecessary to trigger the QTA's limitations clock. George, 672 F.3d

Similarly here, the BLM took no action to deny the public access to North Swag Road. See Kane I, 934 F. Supp. 2d at 1362. Nor have amici established that any of the BLM's management responsibilities pursuant to the wilderness designation were inconsistent with Kane County or Utah's right-of-way on North Swag.

Amici cite three district court opinions for the proposition that the publication of a wilderness designation suffices to trigger the QTA limitations periods. See SUWA Br. 24 (citing S.W. Four Wheel Drive Assoc. v. Bureau of Land Mgmt., 271 F. Supp. 2d 1308, 1312 (D.N.M. 2003), aff'd on other grounds, 363 F.3d 1069, 1070 (10th Cir. 2004); Bd. of Comm'rs of Catron Cnty. v. United States, 934 F. Supp. 2d 1298, 1306 (D.N.M. 2013); Cnty. of Inoyo v. Dep't of Interior, No. CV F 06-1502 AWI DLB, 2008 WL 4468747 (E.D. Cal. Sept. 29, 2008)). These cases ignore the distinction—acknowledged by the BLM itself—between "roads" for the purpose of the Wilderness Act and "roads" under R.S. 2477. See Bd. of Comm'rs of Catron Cnty., 934 F. Supp. 2d at 1304-07; S.W. Four Wheel Drive, 271 F. Supp. 2d at 1310-12. Moreover, these cases are unpersuasive in light of this court's decision in San Juan County.

Thus, we conclude the designation of the Paria-Hackberry WSA and publication of this designation in the Federal Register were insufficient to trigger the limitations period against Kane County under § 2409a(g)

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at 946. The San Juan County court ultimately concluded that the QTA was not triggered because Salt Creek Road remained open to the public, but left room for the possibility that "management activities [that] were inconsistent with the claimed right-of-way" could provide the necessary notice to start the limitations period. 754 F.3d at 794.

and Utah under § 2409a(i). Because we find Utah was not reasonably aware of an adverse claim by the United States, we need not address whether the United States "conducted substantial activities" or "made substantial improvements" to the land under § 2409a(i).

b. The 1991 Meeting of the Board of Commissioners

Next, amici contend the County received notice of the United States' adverse claim to North Swag in 1991, when BLM officials met with County officials to inform them of the necessary procedures for obtaining recognition of R.S. 2477 rights-of-way. SUWA Br. 26. This meeting was brought about by the Secretary of the Interior's December 7, 1988 statement that it was "necessary in the proper management of Federal land to be able to recognize with some certainty the existence, or lack thereof, of public highway grants obtained under R.S. 2477." Kane I, 934 F. Supp. 2d at 1361. Nothing in the minutes of these meetings amounts to an adverse claim by the United States. That some commission members recognized a need to quiet title to R.S. 2477 rights-of-way does not establish that Kane County had reasonable awareness of an adverse claim of the United States. Thus, we affirm the district court's decision finding jurisdiction over North Swag Road under the QTA.

B. PWR 107 and Lands Reserved for Public Uses Under R.S. 2477

R.S. 2477 rights-of-way can only be established over public lands "not *reserved* for public uses." SUWA, 425 F.3d at 784 (emphasis added). The district court concluded that Public Water Reserve (PWR) 107, a 1926 executive order, operated to "reserve" from the operation

of R.S. 2477 two parcels of land across which Swallow Park Road runs. Kane II, 2013 WL 1180764, at *58-59. We disagree.

At the start of the twentieth century, monopolization of public water sources in the West had become a significant problem. See The Classification of the Public Lands, U.S. Geological Survey Bull. 537, at 42-43 (1913). "Water controlled the range," and it became common practice for a landowner to file land scrips upon all water springs in a district, effectively allowing him to exclude all competition. See James Muhn, Public Water Reserves: The Metamorphosis of a Public Land Policy, 21 J. Land Resources & Envtl. L. 67, 68, 81 (2001) (citation omitted). This practice led to regular struggles for possession of watering holes and eventually garnered the attention of Congress and federal land agencies.

In 1910, Congress enacted the Pickett Act (or General Withdrawal Act) granting the President authority to make withdrawals for "water-power sites, irrigation, classification of lands, *or other public purposes*." Act of June 25, 1910, ch. 421, 36 Stat. 847 (emphasis added).[3] Pursuant to the "other public purposes" language of the

[3] The Act additionally provided that withdrawn lands "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals." 37 Stat. 947. Kane County argues that because R.S. 2477 was enacted as Section 8 of the Mining Act of 1866, which (in other provisions) dealt with metalliferous minerals, R.S. 2477 is a "mining law" that "appl[ies] to metalliferous minerals." Kane Br. 15-16. We reject this argument and conclude that the mere coincidence of R.S. 2477's location in a law that later came to be known as the Mining Act of 1866 is insufficient to bring it within the Pickett Act's exception.

Pickett Act, in 1912 President Taft signed what became Public Water Reserve No. 1, a withdrawal order for 16,200 acres covering roughly 32 watering springs in Western Utah. Similar withdrawals of federal land containing water came in a somewhat piecemeal fashion. Opponents of these withdrawals, such as Congressman Frank Mondell of Wyoming, were concerned they might interfere with settlement and acquisition of land in the West. Department of the Interior Secretary Walter Fisher, in defense of the policy, assured Congressman Mondell that the withdrawals did "not mean that [the water sources] are reserved from private uses; on the contrary, it means that those private uses are encouraged and permitted." Muhn, supra, at 85-86.

In the face of uncertainty regarding the legal authority for such withdrawals, Congress in 1916 passed the Stock-Raising Homestead Act (SRHA), Section 10 of which provides:

> [L]ands containing water holes or other bodies of water needed or used by the public for watering purposes . . . may be reserved under the provisions of the [Pickett Act] and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes and under such general rules and regulations as the Secretary of the Interior may prescribe. . . .

Act of Dec. 29, 1916, ch. 9, 39 Stat. 862, 865 (codified at 43 U.S.C. §§ 291 et seq.), repealed by FLPMA.

Pursuant to the SRHA and Pickett Act, in 1926 President Calvin Coolidge signed PWR 107, which provides:

> [I]t is hereby ordered that every smallest legal subdivision of the public-land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of [the SRHA] and in aid of pending legislation.

Public Water Reserve No. 107 (Apr. 17, 1926). Unlike prior withdrawals of water, PWR 107 was a "blanket" withdrawal. Muhn, supra, at 110.

In sending the order to the President, the Secretary of the Interior explained:

> The control of water in the semiarid regions of the west means control of the surrounding areas. . . . Private parties have used various lieu selection and scrip acts as a vehicle of acquiring small areas surrounding these springs and water holes, thus withdrawing them from the common use of the general public . . . and for this reason . . . it is believed advisable to make a temporary general order of withdrawal.

Letter from Hubert Work, U.S. Sec'y of the Interior, to President Calvin Coolidge (Apr. 17, 1926).

In 1929, the Secretary of the Interior construed PWR 107 to include, *inter alia*, two parcels of land through which Swallow Park Road crosses. It is undisputed that the Secretary properly determined that PWR 107 applies to these parcels. Thus, the issue before this

court is whether the two parcels were "reserved for public use"—thus preventing the operation of R.S. 2477—or merely "withdrawn."

The distinction between a reservation and a withdrawal for purposes of R.S. 2477 was set forth by this court in Southern Utah Wilderness Alliance (SUWA) v. Bureau of Land Management, 425 F.3d 735, 784-86 (10th Cir. 2005). The court in SUWA addressed whether the Coal Withdrawal of 1910, which stated that certain federal lands were "withdrawn from settlement, location, sale or entry, and *reserved* for classification and appraisement with respect to coal values," operated to "reserve" those lands for public use under R.S. 2477. Id. at 784 (emphasis added). The court explained that a withdrawal merely "ma[de] land unavailable for certain kinds of private appropriation," whereas a reservation "not only withdraws the land from the operation of the public lands laws, but also dedicates the land to a *particular* public use. Id. (emphasis added). Further, "just because a withdrawal uses the term 'reserved' does not mean that it reserves land 'for public uses.'" Id. at 785.

The court found that despite the coal withdrawal's language, it did not reserve the land at issue "for public use." The historical context of the coal withdrawal established that it "narrowly, and temporarily, removed potential coal lands from certain kinds of private appropriation." Id. at 785. The land was withdrawn to allow the United States to "reexamine and reclassify lands which it thought might have exceptional value"—insufficient, in the court's view, to amount to a reservation. Id. (citation omitted). Further, common sense dictated that the withdrawal, which permitted widespread settlement under public law, "was not meant to cut off

the right to establish access to those claims." Id. at 786. "[I]t would make little sense for Congress to open public lands to private claims but forbid settlers to construct highways to access those claims." Id.

Whether PWR 107 "reserves" land for "public use" presents a closer question than the coal withdrawal at issue in SUWA. PWR 107 goes beyond the mere temporary appropriation SUWA found the Coal Withdrawal to be. Further, PWR 107 withdrew land to "be kept and held open to the public" for "watering purposes" under the SRHA—certainly more of a "public use" than withdrawing lands for reclassification and appraisal. However, SUWA explained that a reservation must set aside land for a *specific* public purpose—such as a park, military post, or Native American land—and PWR 107 simply set aside land for the *general* purpose of preserving water access to the public. See id. at 784 (citing 63C Am. Jur. 2d Public Lands § 31 (2005)).

Determinative here is the fact that if PWR 107 did in fact operate to "reserve" land from the operation of R.S. 2477, its effect was the precise opposite of its purpose. PWR 107 sought to prevent private appropriation and monopolization of water sources in order to guarantee public access to these water sources. If PWR 107 "reserved" land from R.S. 2477, the sole means for the public to construct roads to access these water sources would be eliminated. See id. at 786 ("R.S. 2477 was essentially the only authority by which highways could be established across public lands by state and local governments." (quoting BLM in previous litigation)). As in SUWA, it would be nonsensical for Congress and the President to preserve the public's access to watering

springs "but forbid settlers to construct highways to access" these springs. Id. at 786. That Congress or the President intended to set aside this land for public watering purposes yet silently deny the public the right-of-way to access it is highly improbable.

The United States suggests that R.S. 2477 rights-of-way are not the only ways for the public to access watering holes reserved under PWR 107 and suggests three alternatives. First, it contends that the 1925 Department of Interior regulation Circular No. 1028 "fully protected public access to water sources." Aplee. Br. 56. But Circular No. 1028 merely allowed citizens to apply for a permit to "improve the productivity of any water hole or source of water supply" within a reserve or "conduct such waters from their source within a reserve to a point or place more convenient for public use"; the regulation does not provide for general public access to use the sources. See Supp. App. 103. Next, the United States points to federal regulations setting forth procedures for obtaining a right-of-way across reserved lands. Aplee. Br. 57 (citing 43 C.F.R. § 244.47 (1943)). But these regulations did not come about until 1943, seventeen years after PWR 107. Finally, the United States argues that, as the district court observed, Plaintiffs could simply request a right-of-way pursuant to the FLPMA Title V permit process. Aplee Br. 58 n.27. Perhaps so, but this argument suffers the same flaw as the prior one: the Title V permit process did not become available until the passage of the FLPMA in 1976. See Pub. L. No. 94-579, Title V, § 501, 90 Stat. 2776 (Oct. 21, 1976) (codified at 43 U.S.C. § 1761). The logical consequence of this argument is that PWR 107, an executive order aimed at ensuring public access to water,

had precisely the opposite effect until the passage of the FLPMA in 1976. This argument is untenable.

In SUWA, the court found that common sense dictated that a coal withdrawal that permitted widespread settlement under homestead laws "was not meant to cut off the right to establish access to those claims." 425 F.3d at 786. The same rationale applies here. R.S. 2477 was "essentially the only authority" by which the public could establish roads across federal lands. Id. If PWR 107 cut off that authority, no roads could be developed to access the very water PWR 107 aimed to preserve for public use.

For the foregoing reasons, we conclude PWR 107 was not a "reservation" for the purposes of R.S. 2477 and thus reverse the district court's determination that Plaintiffs could not establish a right-of-way on the segment of Swallow Park Road crossing these parcels. On the remainder of Swallow Park Road, the district court found Plaintiffs presented sufficient evidence to establish an R.S. 2477 right-of-way. Kane II, 2013 WL 1180764, at *52. Because the district court found that "no evidence was presented that the public has been denied access to [the] portions of the road crossing . . . the PWR 107 parcels" and that "the public was able to travel the full length of [Swallow Park Road] as often as it found it convenient or necessary," Kane County and Utah have also established an R.S. 2477 right-of-way over the portion of Swallow Park Road that crosses the PWR 107 parcels as well. Id.

C. Standard of Proof

The district court required Plaintiffs to prove their R.S. 2477 rights-of-way by clear and convincing evidence and found that Plaintiffs had not met this burden as to three of the Cave Lakes roads, K1075, K1087 and K1088. Kane II, 2013 WL 1180764, at *43-45, *55. Kane County and Utah appeal as to K1075 and contend that "preponderance of the evidence" is the appropriate standard of proof for establishing R.S. 2477 rights-of-way. Because we concluded above that the district court erred in exercising jurisdiction over Cave Lakes Road K1075, we do not reach the issue of the appropriate standard of proof.

D. Scope of the Rights-of-Way: North Swag, Swallow Park, and Skutumpah Roads

Swallow Park Road is a narrow, five-mile stretch of dirt road in Western Kane County. A four-mile stretch of the road has a 10-12 foot travel surface with vehicles unable to pass. Similarly, North Swag Road is a narrow dirt road approximately five miles long with a travel surface of ten feet. Skutumpah Road is a major two-lane thoroughfare with a travel surface of 24-28 feet.

The district court found Plaintiffs had established R.S. 2477 rights-of-way on North Swag, Swallow Park, and Skutumpah roads. Kane II, 2013 WL 1180764, at *51-53, *60-62. It determined Plaintiffs held 24-foot rights-of-way on Swallow Park and North Swag Road and a 66-foot right-of-way on Skutumpah Road. The United States contends that the district court committed two errors. First, the United States argues the court failed to base the North Swag and Swallow Park right-of-way widths on uses that were established as of

1976, when R.S. 2477 was repealed.[4] Aplee. Br. 38-44. Second, it contends the district court improperly allowed room for unspecified future improvements to North Swag, Swallow Park and Skutumpah roads. Id. at 45-50. We agree with the United States on both points and remand to the district court.

1. "Reasonable and Necessary" in Light of Pre-1976 Uses

The FLPMA repealed R.S. 2477 in 1976 but preserved existing rights-of-way. See 43 U.S.C. § 1769(a). Thus, R.S. 2477 rights-of-way were preserved "as they existed on the date of passage" of the FLPMA, October 21, 1976. Hodel, 848 F.2d at 1083; see also SUWA, 425 F.3d at 746 ("[T]he 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.").

The width of the road, however, is not limited to the actual beaten path as of October 21, 1976. Hodel, 848 F.2d at 1083; SUWA, 425 F.3d at 746. Courts look to state law to determine the appropriate width, Hodel, 848 F.2d at 1083, and under Utah law, the width of a public road is that which is "reasonable and necessary under all the facts and circumstances." Memmott v. Anderson, 642 P.2d 750, 754 (Utah 1982). Thus, the road can be "widened to meet the exigencies of increased travel," including where necessary to ensure safety. Hodel, 848 F.2d at 1083-84 (citation omitted). However, the "'reasonable and necessary' standard *must be read in the light of traditional uses to which the*

[4] The United States does not challenge the district court's width determination as to the wider portion of Swallow Park Road that is below its intersection with Skutumpah. Aplee. Br. 36 n.17.

right-of-way was put." Id. at 1083 (emphasis added). Thus, the proper inquiry is what width is reasonable and necessary in light of the pre-1976 uses of the road. Id. at 1084 (holding that improvement of the Burr Trail was "reasonable and necessary to ensure safe travel" in light of the pre-1976 uses of livestock transportation, oil, water and mineral development and tourism).

The district court made only a passing reference to Hodel and SUWA's mandate that the reasonable and necessary standard be viewed in light of pre-1976 uses and did not appear to apply this standard to Swallow Park and North Swag roads. Kane II, 2013 WL 1180764, at *63-65. It made substantial factual findings regarding pre-1976 uses of Swallow Park and North Swag and considered these findings in evaluating whether R.S. 2477 rights-of-way existed at all. See id. at *51-52 (Swallow Park), *52-53 (North Swag). However, it did not consider these findings in evaluating their scope. Id. at *65. Instead, the court relied chiefly on travel guidelines published by the American Association of State Highway and Transportation Officials (AASHTO) suggesting road widths for roads providing access to recreational or agricultural areas. These Guidelines may be relevant to the determination of what width is reasonable and necessary in light of the pre-1976 uses of Swallow Park and North Swag roads. However, because the district court did not discuss these pre-1976 uses, we must remand.

The FLPMA "had the effect of 'freezing' R.S. 2477 rights as they were in 1976." SUWA, 425 F.3d at 741. It brought about a "statutory sea change" that "instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation

and preservation." Id. These policies inform our determination of the scope of R.S. 2477 rights-of-way and call for caution in allowing improvements or expansions beyond the width of R.S. 2477 roads in 1976. As this court has consistently held, rights-of-way may be expanded beyond their 1976 widths only where reasonable and *necessary* in light of pre-1976 uses.

2. Unspecified Future Improvements

The district court determined that a 60-foot right-of-way was appropriate for Skutumpah Road and explained that this width would allow "room to address any future realignments or other improvements needed to increase safety." Kane II, 2013 WL 1180764, at *64. As to Swallow Park and North Swag roads, the court determined 24-foot rights-of-way were appropriate, explaining that this width "allow[ed] for maintenance and improvements." Id. at *65. The United States contends that the district court erred in allowing room for unspecified future improvements. We agree.

Hodel explained that "the initial determination of whether activity falls within an established right-of-way is to be made by the BLM and not the court." 848 F.2d at 1084 (citation omitted). SUWA clarified this statement by drawing a sharp distinction between "routine maintenance" and "improvements" to R.S. 2477 rights-of-way. 425 F.3d at 749. When a right-of-way holder undertakes routine maintenance, it need not consult with the pertinent federal land management agency. But, before a holder makes "improvements" to a right-of- way, the land management agency must be consulted to allow it an opportunity to determine if the improvement is "reasonable and necessary" and to "study potential effects, and if appropriate, to formulate alternatives that

serve to protect the lands." Id. at 748. Only in the event of a disagreement at this stage can the parties resort to the courts. Id.

Plaintiffs argue that the United States' right under SUWA to be consulted prior to improvements on the right-of-way was not violated because the district court explained that "realignments or improvements would require consultation with the BLM before they are undertaken." Kane II, 2013 WL 1180764, at *64 n.33. But this places the cart before the horse. A court can find, as did the court in Hodel, that certain proposals for improvement are "reasonable and necessary" in light of the traditional uses of the road, so long as the BLM was consulted in advance. 848 F.2d at 1084. But to allow for unspecified improvements ex ante deprives the BLM of the opportunity to perform its duties effectively. The process set forth in SUWA contemplates a precise order of actions for holders of rights-of-way seeking improvements. First, they consult with the BLM as to the proposed improvements; then, "[i]n the event of a disagreement, the parties may resort to the courts." 425 F.3d at 748. Thus, we find the district court erred in allowing for unspecified improvements in setting the widths of the rights-of-way on Skutumpah, Swallow Park and North Swag roads. Therefore, we remand the question of the scope of the R.S. 2477 rights-of-way on these roads.

AFFIRMED in part, REVERSED in part, and REMANDED.[5]

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[5] We grant the motion of Sierra Club, Grand Canyon trust and National Parks Conservation Association for leave to file an amicus brief.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-4087

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

[Filed: Mar. 8, 2010]

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

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

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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

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 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

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were in fact created on public land." San Juan County v. United States, 503 F.3d 1153, 1168 (10th Cir. 2007) (internal quotation marks and citations omitted).

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 (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 show-

[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.

ing 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 inter-

ests, 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 (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 Stillwell 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 (10th 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.

APPENDIX E

UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:08-CV-315

KANE COUNTY, UTAH, A UTAH POLITICAL SUBDIVISION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Apr. 6, 2009

MEMORANDUM DECISION AND ORDER

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 cases, both in this court and in the Tenth Circuit.[2] The factors to be considered in the analysis and the applicable princi-

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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).

[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*").

ples 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 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

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

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

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

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

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
>
> (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

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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)).

case is whether Kane County or the United States 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]

DATED this 6th day of Apr., 2009.

BY THE COURT:

/s/ CLARK WADDOUPS
HONORABLE CLARK WADDOUPS
U.S. District Judge

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

[9] Docket No. 28.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-4122
(D.C. No. 2:08-CV-00315-CW)
(D. Utah)

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

[Filed: Feb. 27, 2020]

ORDER

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

This matter is before the court on the *Petition by United States of America for Rehearing En Banc*, and

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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.

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.

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.

Entered for the Court,

/s/ CHRISTOPHER M. WOLPERT, Clerk
CHRISTOPHER M. WOLPERT

No. 18-4122, *Kane County, Utah, et al. v. United States*

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.

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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).

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.

1. Piggyback Standing

Applying the rule announced in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (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

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[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.*, 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[.]").

> 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 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 3 (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 4 (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 6. 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 6. **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 U.S. 693, 704 (2013),

[3] Immediately before this statement, the en banc dissent cites *Town of Chester* as "holding merely that '*at the least*, an intervenor

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 5 (next

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of right must demonstrate Article III standing when it seeks additional relief beyond which the plaintiff requests.'" En banc dissent at 4-5. The Court's point preceding these quoted words was that just as with plaintiffs and multiple plaintiffs, "[a]t 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 5. 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 5. 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*.

quoting *Hollingsworth* in a parenthetical for the 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 6-7. 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 (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 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

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[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.

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 1-2, 7, 9. 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 9. 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 prop-

erty'; 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 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 3, 11 n.5, 12. But as the panel majority detailed in *Kane III*, the *Kane I* panel declined to consider whether the United

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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.

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

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[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 11 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.

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 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

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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.

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 "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.

No. 18-4122, *Kane County, Utah, et al. v. United States*

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

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[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.

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 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

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[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.

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 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 137 S. Ct. 1645 (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 (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 *Hol-*

lingsworth 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.

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 (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.

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 (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. 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 (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

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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 7. Nor does anything preclude SUWA's continued participation as an *amicus curiae* in the present suit.

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.

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

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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.

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 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)).

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[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").

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 *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.*

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[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 (Tymkovich, J., dissenting) at 905-06.

Clinton, this court approved intervention where the underlying issue concerned compliance with NEPA and the Federal Land Policy and Management Act in 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.