IN THE SUPREME COURT OF THE UNITED STATES

_____

No. _____

UNITED STATES OF AMERICA, APPLICANT

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

_____

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

_____

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully requests a 60-day extension of time, to and including January 31, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.* The opinion of the court of appeals (App., infra, 1a-35a) is reported at 94 F.4th 1017, and the order denying rehearing en banc (App., infra, 36a-47a) is reported at 113 F.4th 1290. The court of appeals entered its judgment on March 4, 2024, and denied rehearing on September 3, 2024. Unless extended, the time for filing a petition for a writ of certiorari

* Respondents (intervenor defendants-appellants below) are Southern Utah Wilderness Alliance; Sierra Club; The Wilderness Society; and Grand Canyon Trust. Respondents also include Kane County, Utah (plaintiff-appellee below); and the State of Utah (intervenor plaintiff-appellee below).

will expire on December 2, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case concerns intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Respondents Kane County, Utah, and the State of Utah sued the United States to quiet their asserted title to certain rights of way for public roads through federal lands. Respondents Southern Utah Wilderness Alliance, Sierra Club, The Wilderness Society, and Grand Canyon Trust (collectively, SUWA) are environmental groups that moved to intervene as defendants based on their desire to prevent potential harm to the surrounding environment from increased traffic.

The Tenth Circuit has addressed SUWA's entitlement to intervene as of right in other similar cases brought by state and local governments seeking to quiet title to claimed rights of way across federal land in the Western United States. In 2005, a Tenth Circuit panel initially held that SUWA was entitled to intervene as of right, see San Juan County v. United States, 420 F.3d 1197, but the en banc court reversed that ruling by a fractured vote that did not produce a majority opinion, see San Juan County v. United States, 503 F.3d 1163 (2007). In 2010, the Tenth Circuit affirmed the denial of SUWA's motion to intervene as of right in another case brought by Kane County (Kane 1). Kane County v. United States, 597 F.3d 1129. Nine years later, however, a divided

panel of the Tenth Circuit held that SUWA was entitled to intervene as of right in Kane 1 after all. Kane County v. United States, 928 F.3d 877 (2019), cert. denied, 141 S. Ct. 1284 (2021), and 141 S. Ct. 1283 (2021).

In that 2019 decision, the panel held that although SUWA was not entitled intervene as of right for purposes of litigating title to a claimed right of way -- that is, whether the right of way existed -- it was entitled to intervene as of right for purposes of litigating the scope of a claimed right of way -- for instance, the width of a roadway -- on the ground that even if the United States adequately represented SUWA's interests with respect to title, it did not adequately represent SUWA's interests with respect to scope. See 928 F.3d at 892-894. The Tenth Circuit denied rehearing en banc by an equally divided 5-5 vote, Kane County v. United States, 950 F.3d 1323 (2020), and this Court denied certiorari, United States v. Kane County, 141 S. Ct. 1284 (2021) (No. 20-96); Kane County v. United States, 141 S. Ct. 1283 (2021) (No. 20-82).

In this case, the district court denied SUWA's fifth motion to intervene as of right with respect to both title and scope, App., infra, 48a-101a, but certified its order for interlocutory review, 2022 WL 2669931. The United States sought initial hearing en banc, arguing that Kane 1's distinction between title and scope

was inconsistent with San Juan, confusing, and analytically unsound, and that only the en banc court could resolve the issue. C.A. Doc. 74, at 14-15 (Feb. 3, 2023). Kane County and Utah also sought initial hearing en banc. C.A. Doc. 80 (Feb. 3, 2023). The Tenth Circuit denied both petitions. C.A. Doc. 88 (Feb. 7, 2023). Consistent with Kane 1, the panel then affirmed the district court's denial of intervention as of right with respect to title, but reversed with respect to scope. App., infra, 1a-35a. The United States, Kane County, and Utah sought rehearing en banc -- but just as in Kane 1, the Tenth Circuit denied rehearing en banc by an equally divided 5-5 vote. App., infra, 36a-47a.

2. The Solicitor General is considering whether to file a petition for a writ of certiorari in this case. The additional time sought is needed to permit further consultations within the Department of Justice and with other agencies regarding the legal and practical ramifications of the court of appeals' decision, and, if certiorari is authorized, to prepare and print the petition.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NOVEMBER 2024

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

March 4, 2024

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KANE COUNTY, UTAH,

Plaintiff - Appellee,

STATE OF UTAH,

Intervenor Plaintiff - Appellee,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee,

and

SOUTHERN UTAH WILDERNESS ALLIANCE; SIERRA CLUB; THE WILDERNESS SOCIETY; GRAND CANYON TRUST,

Movants - Appellants.

No. 22-4087

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:10-CV-01073-CW)

Kathleen R. Hartnett, Cooley LLP, San Francisco, California (Stephen H.M. Bloch and Michelle White, Southern Utah Wilderness Alliance, Salt Lake City Utah; John C. Dwyer and Tijana Brien, Cooley LLP, Palo Alto, California; Lauren Pomeroy, Cooley LLP, San Francisco, California; and Trevor J. Lee and Mitch M. Longson, Manning Curtis Bradshaw & Bednar PLLC, Salt Lake City, Utah, with her on the briefs), for Movants-Appellants.

John E. Bies, United States Department of Justice, Environmental & Natural Resources Division (Todd Kim, Assistant Attorney General, with him on the brief), Washington, D.C., for Defendant-Appellee United States of America.

Shawn T. Welch, Holland & Hart LLP (Michelle Quist, Holland & Hart LLP, with him on the brief) Salt Lake City, Utah, for Plaintiff-Appellee Kane County, Utah.

Sean D. Reyes, Utah Attorney General, Anthony L. Rampton, Kathy A.F. Davis, and K. Tess Davis, Assistant Attorneys General, Salt Lake City, Utah, on the brief for the Intervenor Plaintiff-Appellee The State of Utah.

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

PHILLIPS, Circuit Judge.

We are called on again to review an order denying a motion to intervene as of right in the Kane County litigation. Most recently, in a 2019 appeal involving the same parties raising the same issues and interests—but different alleged rights-of-way—we concluded that Southern Utah Wilderness Alliance (SUWA) (1) had Article III standing and (2) was entitled to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. *Kane Cnty. v. United States* (*Kane III*), 928 F.3d 877, 882 (2019), *cert. denied*, 141 S. Ct. 1283, 1284 (2021). Because there is no material distinction between this case and *Kane III*, we reverse the district court's denial of SUWA's motion to intervene on the issue of scope and remand for further proceedings consistent with this opinion.

BACKGROUND

This appeal comes to us amid years of litigation between Kane County, Utah and the United States under the Quiet Title Act, 28 U.S.C. § 2409a. The Act 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). During the past fifteen-plus years, Kane County has filed multiple lawsuits seeking to quiet title to hundreds of alleged rights-of-way crossing federal land in Kane County, Utah. The suits rely on Section 8 of the Mining Act of 1866, more commonly known as Revised Statute (R.S.) 2477.

In enacting R.S. 2477 in 1866, Congress codified "a standing offer of a free right of way" over public lands not already "reserved for public uses." *Lindsay Land & Live Stock Co. v. Churnos*, 285 P. 646, 648 (Utah 1929) (cleaned up).[1] But on October 21, 1976, "Congress enacted the Federal Land Policy and Management Act, which repealed R.S. 2477, but preserved already-existing rights-of-way." *Kane III*, 928 F.3d at 882 (citing 43 U.S.C. § 1769(a)). Congress' repeal of R.S. 2477 "had the effect of 'freezing'" rights-of-way in existence before October 21, 1976. *Kane Cnty. v. United States* (*Kane II*), 772

[1] As we have previously noted, "[a] right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way." *S. Utah Wilderness All. v. Bureau of Land Mgmt.* (*SUWA v. BLM*), 425 F.3d 735, 747 (10th Cir. 2005).

F.3d 1205, 1224 (10th Cir. 2014) (quoting *S. Utah Wilderness All. v. Bureau of Land Mgmt.* (*SUWA v. BLM*), 425 F.3d 735, 741 (10th Cir. 2005)), *cert. denied*, 577 U.S. 922 (2015).

In 2008, Kane County filed its first quiet-title action (*Kane (1)*) seeking to quiet title to fifteen alleged R.S. 2477 rights-of-way. Then, in 2010, while *Kane (1)* was proceeding, Kane County, later joined by the State of Utah as an intervenor (collectively, "Kane County"), filed this action (*Kane (2)*) seeking to quiet title to sixty-four more rights-of-way.[2] In 2011, and again in 2012, Kane County and the State of Utah filed two more actions (styled as *Kane (3)* and *Kane (4)*), claiming title to 711 more rights-of-way. The district court consolidated *Kane (3)* and *Kane (4)* with *Kane (2)*. *See generally Kane Cnty. (2), (3), & (4) v. United States* (*Kane (2)*), 606 F. Supp. 3d 1138 (D. Utah 2022). Like the parties, we refer to these consolidated cases as *Kane (2)*. Though *Kane (2)* involves claims to different alleged R.S. 2477 rights-of-way than those in *Kane (1)*, the legal issues, parties, state, county, and the presiding district court judge are the same.

[2] In December 2011, the district court granted the State of Utah's motion to intervene as plaintiff in support of Kane County's claims based, in part, on the United States' concession that the State of Utah met Rule 24(a)(2)'s requirements.

In *Kane (1)*, SUWA[3] moved to intervene as of right as a defendant in support of the United States under Rule 24(a)(2) of the Federal Rules of Civil Procedure.[4] On March 6, 2020, we issued the mandate in *Kane III* directing the district court to grant SUWA's motion to intervene as of right in the remand proceedings in *Kane (1)*, where the one remaining issue was the scope of three of Kane County's R.S. 2477 rights-of-way. *See Kane III*, 928 F.3d at 882, 884–85.

In *Kane (2)*, relying on our ruling in *Kane III*, SUWA moved to intervene as of right. Two years later, the district court denied this intervention motion, remarking that *Kane III* did not grant SUWA a "*per se* right to intervene in R.S. 2477 cases" and that the intervention motion before it in *Kane (2)* was "distinguishable" from the intervention motion in *Kane (1)*. *Kane (2)*, 606 F. Supp. 3d at 1142.

SUWA now appeals, asking us to determine whether, based on *Kane III*—which allowed SUWA to intervene in *Kane (1)*—the district court erred in denying its motion to intervene in *Kane (2)*.

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[3] SUWA is a member-based nonprofit dedicated to preserving the wilderness of the Colorado Plateau. In *Kane (2)*, The Wilderness Society, Sierra Club, and Grand Canyon Trust have joined SUWA's motions to intervene. We refer to these parties collectively as "SUWA."

[4] "[W]hen a party intervenes [under Rule 24(a)(2)], it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993) (citation omitted).

We begin by retracing the history of *Kane (1)* to put the present appeal in context.[5]

I. SUWA's Intervention as of Right in *Kane (1)*

In 2008, seven months after Kane County filed its complaint in *Kane (1)*, SUWA moved to intervene as of right as a defendant in the action under Rule 24(a)(2). Rule 24(a)(2) requires that "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." *Kane III*, 928 F.3d at 889 (citing Fed. R. Civ. P. 24(a)(2)).

The district court denied SUWA's motion. Addressing Rule 24(a)(2)'s interest prong, the court concluded that SUWA lacked a legal interest relating to the asserted rights-of-way. *Kane Cnty. (1) v. United States*, No. 08-cv-00315, 2009 WL 959804, at *2 (D. Utah Apr. 6, 2009). This conclusion rested on the court's view that "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 the roads." *Id.* Next, addressing the adequate-representation prong, the

[5] From the 2008 lawsuit now styled as *Kane (1)*, this court has issued three published opinions: in 2010, 2014, and 2019. All three opinions are part of *Kane (1)*, as each appeal addressed an issue arising from that lawsuit. The instant appeal arises from Kane County's later litigation: *Kane (2)*. Though *Kane (2)* is a separate case, our decision in *Kane (1)* governs the analysis in this appeal too, because both lawsuits involve R.S. 2477 claims by Kane County to quiet title against the United States in Kane County, Utah.

court concluded that even if SUWA did have a legal interest relating to the asserted rights-of-way, it had failed to show that the United States would not "vigorously defend" its own claim "to legitimate title to the roads." *Id.* at *3. SUWA appealed.

A. *Kane I*

We affirmed the district court's denial of SUWA's motion to intervene as of right on the R.S. 2477 title issue. *Kane Cnty. v. United States* (*Kane I*), 597 F.3d 1129, 1133 (10th Cir. 2010). We agreed with the district court's determination that "even assuming SUWA has an interest in the quiet title proceedings at issue, SUWA . . . failed to establish that the United States may not adequately represent SUWA's interest." *Id.* But during oral argument, the court questioned SUWA's counsel about whether the adequacy-of-representation result might be different on the issue of scope. *Id.* at 1135. Ultimately, we treated that issue as waived "for purposes of th[e] appeal." *Id.* In affirming, we noted that SUWA had "failed to establish, *at this stage of the litigation*, that the federal government will not adequately protect its interest." *Id.* (emphasis added).

Soon after we decided *Kane I*, the district court granted the State of Utah's motion to intervene as of right as a plaintiff under Rule 24(a)(2). The next year, the district court held a bench trial on the disputed rights-of-way. After post-trial briefing—in which SUWA participated in a limited capacity as amicus curiae—the district court quieted title to Kane County and the State of

Utah on twelve of the fifteen alleged rights-of-way. The court also decided the scope of those twelve rights-of-way. The United States and Kane County (joined by the State of Utah) filed separate appeals, bringing the case before us again.

B. *Kane II*

As pertinent here, we reversed the district court's scope determination for three of the rights-of-way. *Kane II*, 772 F.3d at 1223–25. We did so (1) because the district court had determined the scope of the three rights-of-way without considering their respective uses before 1976, and (2) because the court's decision allowed "room for unspecified future improvements." *Id.* We remanded for the district court to redetermine the scope of those three rights-of-way "in light of the pre-1976 uses." *Id.* at 1223.

On remand, SUWA again moved to intervene to participate in proceedings on the sole outstanding issue: the scope of three of Kane County's rights-of-way. The district court again denied SUWA's motion. SUWA timely appealed.

C. *Kane III*

We reversed the district court's intervention ruling. *Kane III*, 928 F.3d at 882. Reviewing de novo, we concluded that SUWA had standing to intervene as a party defendant. *Id*. at 889–90. Next, we determined that SUWA had met all requirements to intervene as of right under Rule 24(a)(2): (1) that SUWA's application was timely; (2) that SUWA had an interest relating to the property

or transaction which is the subject of the action; (3) that SUWA's interest may as a practical matter be impaired or impeded by the litigation; and (4) that SUWA's interest may not be adequately represented by the United States. *See id.* at 890–96.

In analyzing the adequate-representation prong—the focus of the appeal now before us—we concluded that "SUWA's and the United States' interests are not identical" on the issue of scope, and therefore that "no presumption of adequate representation applies." *Id.* at 895; *see id.* at 892 ("When a would-be intervenor's and the representative party's interests are 'identical,' we presume adequate representation.") (quoting *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986)).

We described SUWA's interest in the scope determination as being "to limit as much as possible the number of vehicles on the roads." *Id.* at 894. We contrasted that with the United States' representing "multiple interests," including "competing policy, economic, political, legal, and environmental factors." *Id.* (quoting *San Juan Cnty. v. United States*, 503 F.3d 1163, 1229 (10th Cir. 2007) (Ebel, J., concurring in part, and dissenting in part)).[6] We

[6] In *San Juan County*, seven of thirteen members of the en banc court addressed the issue of adequate representation. Of those seven, three joined Judge Ebel's opinion. In *Kane III*, this court adopted the reasoning in Judge Ebel's opinion. *See* 928 F.3d at 893 ("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.' We now adopt this reasoning." (citation omitted)).

summarized it this way: though "SUWA is focused on pursuing the narrowest scope, . . . many of the stakeholders involved may want wider roads," and the United States represents these "competing interests." *Id.* at 895. So even if the United States was advocating "as well as can be expected" for the narrowest scope of the rights-of-way, we concluded that its representation of such "broad-ranging and competing interests" rendered its representation of SUWA's interests inadequate. *Id.*; *see Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1112 (10th Cir. 2002) ("We have repeatedly pointed out that . . . 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." (cleaned up)).

"In addition to the public interest," we observed that "the United States must consider internal interests, such as the efficient administration of its own litigation resources" in resolving the "12,000 R.S. 2477 claims" it is defending in Utah "'as quickly and efficiently as it can,' *an interest that SUWA certainly doesn't share*." *Id.* at 895 (emphasis added) (cleaned up) (quoting counsel for the United States at Oral Argument at 24:30).[7] We reinforced this rationale by

[7] "When pressed at oral argument" in *Kane III* "about whether [the United States] was seeking a reviewable judicial order in th[at] case, the United States responded that it 'has 12,000 of these claims statewide' and is

(*footnote continued*)

pointing to the United States' opposition to SUWA's intervention motion. *Id.* (citing *San Juan Cnty.*, 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."); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 997 (10th Cir. 2009) (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 Cntys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) ("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." (cleaned up)).[8]

'interested in trying to resolve them as quickly and efficiently as it can.'" 928 F.3d at 895 (cleaned up). This interest, we observed, was "an interest that SUWA certainly doesn't share." *Id.*

[8] Alternatively, we decided that "even if" SUWA and the United States had identical interests in the scope determination—meaning a presumption of adequate representation would apply—SUWA would have rebutted the presumption. *Kane III*, 928 F.3d at 895–96. The United States' sudden inclination to engage in settlement negotiations in *Kane (1)* after the inauguration of a new presidential administration—though the case had proceeded on remand for two-and-a-half years—signified to us that SUWA's interests and the United States' interests had possibly diverged. *Id.* Because Presidential administrations have changed in the years since then, SUWA's argument on this point is gone, and it has no place in the present appeal.

"[G]iven our court's relaxed intervention requirements in cases raising significant public interests such as this one, and our liberal approach to intervention," we held that "SUWA ha[d] satisfied its minimal burden of showing that the United States may not adequately represent its interests." *Id.* at 896–97 (cleaned up). Accordingly, we reversed the district court's denial of SUWA's motion to intervene. *Id.* at 897. As a result of our ruling, SUWA is now participating as a party in the district court remand proceedings in *Kane (1)*.[9]

II. SUWA's Intervention Attempts in *Kane (2)*

In *Kane (2)*, SUWA has four times sought to intervene as of right as a defendant in support of the United States.[10] Though for context we briefly review each of SUWA's motions below, the present appeal concerns just the denial of SUWA's fourth motion to intervene.

The first denial. On September 10, 2014, the district court denied SUWA's first motion to intervene as of right in *Kane (2)*, but granted SUWA permissive intervention subject to certain limitations on its participation in

[9] At oral argument in this appeal, SUWA confirmed that it is now participating in remand proceedings in *Kane (1)* as an intervenor of right—calling experts and witnesses and submitting briefing. *See* Oral Argument at 2:00–2:35.

[10] Kane County represents that this is SUWA's "fifth attempt" to intervene in this case. *See* K.C. Br. at 7. To reach this figure, Kane County counts SUWA's near identical motions that it filed on two different dockets a few days after those dockets had been consolidated.

discovery, claims and defenses, motions, settlement negotiations, and trial.[11] One such limitation was that SUWA could not file any motion without the district court's permission. Thus, SUWA filed each motion discussed below after first obtaining the court's permission.

The second denial. On May 25, 2018, SUWA filed its second motion to intervene as of right. SUWA argued that "[g]ood cause now exists to revisit the [2014] Intervention Order." App. vol. II, at 535. In support, SUWA relied on "the change in the Presidential Administration." *Id.* SUWA asserted that this change had "resulted in a fundamental transformation in land policy that has placed the United States at best beholden to a diversity of new interests, if not entirely at odds with SUWA." *Id.* Denying SUWA's second motion, the district court ruled that "no change to SUWA's intervention status is warranted," because "SUWA's arguments that the United States no longer represents its interests are unavailing." App. vol. IV, at 1150.

The third denial. On July 10, 2019, after we issued the order in *Kane III*, SUWA filed its third motion to intervene. This time, SUWA argued that "in a related case, the Tenth Circuit recently held that the Court's conclusions about SUWA's interests were incorrect and SUWA is legally entitled to intervention as of right." App. vol. VI, at 1553. Ultimately, the district court denied

[11] Whether to grant permissive intervention under Rule 24(b) "lies within the discretion of the district court," and allows parties to participate in the litigation, subject to limitations imposed by the district court. *Kane I*, 597 F.3d at 1135.

SUWA's motion, reasoning, in part, that it was not bound by the *Kane III* decision because the mandate in that case had not yet issued due to pending en banc petitions. *Kane Cnty. (2), (3), & (4) v. United States*, 333 F.R.D. 225, 243–44 (D. Utah 2019).

SUWA then sought a writ of mandamus from this court, asking us to review the district court's denial of its third intervention motion and to reassign the ongoing R.S. 2477 cases to a different district court judge. In deciding SUWA's request, we noted that the district court had stated that "[w]hen the mandate on [*Kane III*] ultimately issues, the court will respect the ruling." App. vol. VII, at 1885. And so in our view, the only error that SUWA had shown was that the district court "at most" had "erred as a matter of law in holding that the district court is not bound, pre-mandate, to apply *Kane* [*III*] in the other pending R.S. 2477 cases." *Id.* at 1889. Because "such an error would not constitute 'the egregious error necessary for the court to issue a writ of mandamus,'" we denied SUWA's requested relief. *Id.* (citations omitted).

In February 2020, in *Kane (2)*, the district court held a three-week bellwether bench trial on fifteen of the 775 claimed rights-of-way.

The fourth denial. This brings us to SUWA's present appeal of the denial of its fourth motion to intervene. Four days after we issued the mandate in *Kane III*, SUWA sought the district court's permission to file a motion to intervene as of right. The district court ordered expedited briefing on SUWA's request, and on March 16, 2020, the court entered an order allowing SUWA to

file its intervention motion. On April 6, 2020, SUWA filed its motion asserting that it was entitled to intervene as of right on the issues of title *and* scope because (1) the district court must apply *Kane III*, (2) SUWA has an interest that may be impaired by the litigation, and (3) the United States does not adequately represent SUWA's interests. Both Kane County and the United States opposed SUWA's motion.

More than two years later, the district court issued an order, once again denying SUWA's motion to intervene as of right on the issues of title and scope. *Kane (2)*, 606 F. Supp. 3d at 1142. The district court began by acknowledging that, under *Kane III*, SUWA had both piggyback and Article III standing. *Id.* at 1142–45; *see Kane III*, 928 F.3d at 886–89. And though Kane County then (for the first time) asserted that "SUWA lack[ed] prudential standing," the court declared that it is "unclear . . . what the interplay is between piggyback standing and prudential standing," and it declined to resolve the prudential-standing issue.[12] *Kane (2)*, 606 F. Supp. 3d at 1145; *see also Kane III*, 928 F.3d at 886 n.9 (noting that neither Kane County nor the United States challenged SUWA's prudential standing). Turning to the intervention requirements under Rule 24(a)(2), the court relied on *Kane III* and *San Juan County* in ruling that SUWA had shown a Rule 24(a)(2) interest in the case.

[12] On appeal, Kane County challenges SUWA's prudential standing, but it does not contend that prudential standing is required to intervene under Rule 24(a)(2). *See* K.C. Br. at 39–41. So we do not consider that issue further.

606 F. Supp. 3d at 1152.[13] But because the court determined that SUWA's interests were "*adequately* represented by the United States," it denied SUWA's motion on the adequate-representation prong. *Id.* at 1153–54.

At SUWA's request, the district court certified an interlocutory appeal under 28 U.S.C. § 1292(b) to enable SUWA to challenge its denial of intervention as of right in the *Kane (2)* proceedings. On September 13, 2022, this court exercised its discretion to hear SUWA's appeal. On February 3, 2023, the same day that the United States and Kane County filed their merits briefs, they each petitioned for initial hearing en banc, which SUWA opposed. On April 17, 2023, we denied the en banc request and assigned the appeal for oral argument. Now, exercising jurisdiction under § 1292(b), we affirm in part and reverse in part.

STANDARD OF REVIEW

We review de novo the denial of a "successive motion to intervene" when "a proposed intervenor shows that the circumstances have changed between the two motions to intervene." *Kane III*, 928 F.3d at 889. In its mandate in *Kane III*, this court announced controlling legal principles on intervention, which

[13] The district court did not mention the timeliness requirement of Rule 24(a)(2). We note that neither Kane County nor the United States asserts that SUWA's fourth motion to intervene was 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 . . . ." *Kane III*, 928 F.3d at 890–91. Because SUWA promptly requested permission from the district court after we issued our mandate in *Kane III*, we conclude that SUWA's fourth motion was timely under Rule 24(a)(2).

SUWA relied on in its fourth intervention motion. *See id.* at 884 (deciding that "though SUWA and the United States had identical interests in the title determination, they do not on scope"). Given this change in circumstances, "[w]e see no sense in blocking ourselves from the same de novo review we give the initial motion to intervene." *Id.* at 890.

LEGAL FRAMEWORK

Before proceeding to the merits of the intervention issue, we briefly describe the legal framework governing R.S. 2477 claims under the Quiet Title Act. Such disputes involve two issues: title and scope, which the district court is to address "in separate steps." *Kane III*, 928 F.3d at 894.

First, the court makes the "binary determination of whether a right-of-way exists at all." *Id.* at 884; *accord Kane I*, 597 F.3d at 1134 (quoting *San Juan Cnty.*, 503 F.3d at 1228 (Ebel, J., concurring in part, and dissenting in part)). Second, the court determines "the pre-1976 uses of the right-of-way." *Kane III*, 928 F.3d at 884. And third, the court decides "whether, based on the pre-1976 use, the right-of-way should be widened to meet the exigencies of increased travel." *Id.* Thus, step one concerns title, and steps two and three, scope. Both title and scope are questions of state law. *See SUWA v. BLM*, 425 F.3d at 768 (applying state law to decide title); *Kane III*, 928 F.3d at 884 (applying state law to decide scope).

At step one, in deciding whether a right-of-way exists, the court evaluates whether the grant of the alleged R.S. 2477 right-of-way was accepted

through continuous public use before October 21, 1976. *SUWA v. BLM*, 425 F.3d at 771 ("Acceptance of an R.S. 2477 right of way in Utah . . . requires continuous public use for a period of ten years."). If Kane County proves such pre-1976 acceptance, the court must quiet title to the identified travel surface—i.e., the beaten path—in favor of Kane County. But otherwise, Kane County's quiet title claim must fail.

If Kane County succeeds in proving that the R.S. 2477 right-of-way exists, the litigation proceeds to the more "nuanced" scope inquiry.[14] *Kane III*, 928 F.3d at 893 (quoting *San Juan Cnty.*, 503 F.3d at 1229 (Ebel, J., concurring in part, and dissenting in part)). Here, "scope" refers to the "width based on the pre-1976 use." *Id.* But the "width" of a right-of-way "is not limited to the actual beaten path as of October 21, 1976." *Kane II*, 772 F.3d at 1223. In Utah, the width of a right-of-way is that which is "reasonable and necessary under all the facts and circumstances." *Id.* (quoting *Memmott v. Anderson*, 642 P.2d 750, 754 (Utah 1982)). And so an R.S. 2477 right-of-way "can be widened to meet the exigencies of increased travel, including where necessary to ensure safety." *Id.* (cleaned up). But still, the reasonableness and necessity of any expansion

[14] *See, e.g.*, *Kane Cnty. v. United States*, No. 08-cv-00315, 2011 WL 2489819, at *7–9 (D. Utah June 21, 2011) (granting in part Kane County's motion for summary judgment—quieting title to select roads in favor of Kane County but reserving "issues pertaining to scope" for trial); *Kane II*, 772 F.3d at 1223 (accepting the district court's determination that Kane County had proven title to three rights-of-way with a "travel surface" of 10 feet, 10–12 feet, and 24–48 feet, respectively, but reversing for further proceedings to determine the scope of those rights-of-way).

beyond the "actual beaten path" before October 21, 1976, must be read "*in the light of traditional uses to which the right-of-way was put*." *Id.* (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988), *overruled on other grounds*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992)).

Thus, to determine the scope of an R.S. 2477 right-of-way, the court undertakes steps two and three.

At step two, the court "determine[s] the pre-1976 uses of the right-of-way" based on historical evidence. *Kane III*, 928 F.3d at 884.[15] And at step three, based on the pre-1976 use, the court must decide, under Utah law, whether "Kane County . . . [is] entitled to widen the scope of the rights-of-way beyond the beaten path existing before October 21, 1976." *Id.* at 894.[16]

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[15] "Uses" is plural because there may be multiple pre-1976 uses relevant to determining the scope of the right-of-way. For example, in *Hodel*, we observed that the district court had found several pre-1976 uses including, "driving livestock; oil, water, and mineral development"; and tourism. 848 F.2d at 1084.

[16] "To the extent that" Kane County "wishes to improve the right-of-way beyond what is reasonable and necessary, however, it must first consult with" the Bureau of Land Management. *Kane III*, 928 F.3d at 884 & n.4 (citation omitted) (distinguishing "routine maintenance, which does not require consultation with the BLM," from "construction of improvements, which does"). "Construction of improvements" includes, for example, "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

(*footnote continued*)

With this three-step framework in mind, we proceed to the question of whether the United States adequately represents SUWA's interests in this case.

DISCUSSION

Before this court, SUWA challenges the district court's denial of its fourth motion to intervene not only on scope but on title. Kane County and the United States have each filed separate response briefs. Though Kane County seeks affirmance of the district court's denial of intervention it does not explain how *Kane III* is distinguishable from this case.[17] In contrast, the United States concedes that "there are no material differences" between this case and *Kane III*, and thus that this panel is "bound by [that] controlling precedent." U.S. Br.

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any other change in the nature of the road that may significantly impact Park lands, resources, or values." *Id.* (quoting *SUWA v. BLM*, 425 F.3d at 748–49). "[R]outine maintenance," in contrast, "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.* (quoting same).

[17]At most, Kane County asserts that "[e]ach case has different facts, different roads, and different circumstances," K.C. Br. at 43, but does not identify how such differences remove this case from the ambit of *Kane III*.

We acknowledge that Kane County's brief goes on to assert that, notwithstanding *Kane III*, SUWA does not have standing and cannot satisfy the interest prongs of Rule 24(a)(2). But because a panel lacks authority to override *Kane III*, Kane County must obtain en banc review before pursuing those arguments. *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1142 (10th Cir. 2023) (emphasizing that one panel cannot override the decision of another panel). We therefore presume that because Kane County filed a motion for an initial en banc review the same day it filed its merits brief, Kane County has asserted these arguments to preserve them for consideration by an en banc court.

at 16. The United States adds that, under *Kane III*, we must affirm the district court's denial of SUWA's motion to intervene as to title but reverse as to scope.[18] *Id.* We agree with the United States.

I. Intervention as of Right Under Rule 24(a)(2)

To intervene as of right under Rule 24(a)(2), SUWA must establish (1) that the application is timely, (2) that it claims an interest relating to the property or transaction that is the subject of the action, (3) that the interest may as a practical matter be impaired or impeded, and (4) that the interest may not be adequately represented by the United States.

No party disputes that SUWA's motion is timely. And the district court acknowledged that under governing law, SUWA has an interest that may as a practical matter be impaired or impeded. *Kane (2)*, 606 F. Supp. 3d at 1152; *see San Juan Cnty.*, 503 F.3d at 1190–1203; *Kane III*, 928 F.3d at 891–92; *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010) ("With respect to Rule 24(a)(2), we have declared it indisputable that a prospective intervenor's environmental concern is a legally protectable interest." (cleaned up)). So the only issue in dispute is whether the district

[18] The United States' brief asserts additional arguments challenging this court's reasoning in *Kane III* as it relates to SUWA's intervention under Rule 24(a)(2) "to be considered by the full court if it grants initial hearing en banc and to preserve them for further review." U.S. Br. at 23. As with Kane County's en banc arguments, we acknowledge but do not reach them. *See Arostegui-Maldonado*, 75 F.4th at 1142.

court erred in concluding that the United States adequately represents SUWA's interests.

As the proposed intervenor, SUWA must show that the representation by the existing parties may be inadequate; but this burden is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." (quoting 3B J. Moore, Federal Practice 24.09–1 (4) (1969)); *accord Berger v. N. Carolina State Conf. of the NAACP*, 597 U.S. 179, 195 (2022) ("This Court has described the Rule's test as presenting proposed intervenors with only a minimal challenge."); *see also Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 578 F.2d 1341, 1346 (10th Cir. 1978) ("[T]he possibility of divergence of interest need not be great in order to satisfy th[is] burden . . . .").

When a would-be intervenor's and the representative party's interests are "identical," we presume adequate representation. *Bottoms*, 797 F.2d at 872. But "this presumption applies only when interests overlap fully." *Berger*, 597 U.S. at 196–97 (cleaned up). As the Supreme Court recently stated, "[w]here 'the absentee's interest is similar to, but not identical with, that of one of the parties,' that normally is not enough to trigger a presumption of adequate representation." *Id.* at 197 (quoting 7C Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1909 (3d ed. Supp. 2022)). And when, as here, the

government is the representative party, we have expressed doubt about whether it can "adequately represent the interests of a private intervenor *and* the interests of the public." *W. Energy All. v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017). We have also noted 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." *Clinton*, 255 F.3d at 1256. "This potential conflict exists even when the government is called upon to defend against a claim which the would-be intervenor also wishes to contest." *Id.*

A. The United States does not adequately represent SUWA's interests on the issue of scope.

As detailed above, we determined in *Kane III* that the United States does not adequately represent SUWA's interests on scope. But the district court brushed past *Kane III* in remarking that *Kane III* did not create "a *per se* right to intervene in R.S. 2477 cases" and that *Kane III* is "distinguishable" from this case. *Kane (2)*, 606 F. Supp. 3d at 1142. But *Kane III*'s intervention analysis applies in this substantially identical case. As spelled out below, we are unpersuaded by any of the district court's reasons for saying otherwise.

1. The United States' Interest

The district court ruled that the "very nature of the legal analysis and evidence" in this R.S. 2477 litigation shows that "competing policy, economic, political, legal, and environmental factors" are extraneous to the scope

determination. *Kane (2)*, 606 F. Supp. 3d at 1152–53 (quoting *Kane III*, 928 F.3d at 893–94). Viewed this way, the court determined that the only interest that the United States represents is its "exclusive title to property." *Id.* at 1153. We disagree.

First, we conclude that the "nature of the legal analysis and evidence" in *Kane III* is indistinguishable from that in this case. *See id.* As the United States concedes, this case and *Kane III* have no material differences that would alter the nature of the legal analysis or evidence. Indeed, the only difference we detect is that the two cases involve separate alleged R.S. 2477 rights-of-way. But neither the parties' briefs nor the district court's order identifies why *this* difference matters.

Second, the district court misidentifies the United States' interests in the scope determination. In the court's view, the only interest that the United States represents is its "exclusive title to property." *Id.* But as outlined above, the scope issue arises only after the United States has lost on the underlying title dispute—meaning after the district court has quieted title in favor of Kane County. Thus, when the United States begins litigating scope, it has already lost its title argument and is next litigating the permitted use and width of the right-of-way.[19] The district court's scope determination will dictate how Kane

[19] We agree with Kane County that scope encompasses both use and width. *See* Oral Argument at 32:10. Due to the limited nature of the property right, "alter[ing] the use" of the right-of-way "affects the [United States'] (*footnote continued*)

County can use its right-of-way, for instance as a two-lane vehicular road, a two-track jeep trail, a bridle path, or a footpath. *See SUWA v. BLM*, 425 F.3d at 747–48. So contrary to the district court's view, the scope determination is not about *the United States' exclusive title to property*; it is about how Kane County can use its right-of-way across federal public land. Moreover, in *Kane III*, we rejected the view that in litigating the *scope* of an R.S. 2477 right-of-way, the United States' only interest is its exclusive title to property. 928 F.3d at 894.

We acknowledge that "the federal government is not always legally obligated to consider a broader spectrum of views." *Kane (2)*, 606 F. Supp. 3d at 1153. But as the district court itself recognized, such an obligation "arises when it is 'litigating on behalf of the general public.'" *Id.* (quoting *Clinton*, 255 F.3d at 1256); *see also Clinton*, 255 F.3d at 1256 ("In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views . . . ."); *WildEarth Guardians*, 573 F.3d at 996–97 (observing that the federal government "has multiple objectives" in litigating on "behalf of the general public" (citation omitted)). And as we determined in *Kane III*, because

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servient estate," even if "conducted within the physical boundaries" of the right-of-way. *SUWA v. BLM.*, 425 F.3d at 747. "Utah adheres to the general rule that the owners of the dominant and servient estates 'must exercise [their] rights so as not unreasonably to interfere with the other.'" *Hodel*, 848 F.2d at 1083 (quoting *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 158 (Utah 1946); and then citing *Nielson v. Sandberg*, 141 P.2d 696, 701 (Utah 1943) (denoting that an easement is limited to the original use for which it was acquired)).

the property at issue in R.S. 2477 litigation "is public land, public interests are involved." *Kane III*, 928 F.3d at 894 (citing *Block*, 461 U.S. at 284–85) (observing that the Quiet Title Act was "necessary for the protection of the national public interest"); *see also San Juan Cnty.*, 503 F.3d at 1167 (qualifying R.S. 2477 rights-of-ways as those over "public lands").

As in *Kane III*, the scope issue in this case concerns the use of R.S. 2477 rights-of-way across the Grand Staircase-Escalante National Monument—i.e., federal public lands. *See* 54 U.S.C. § 320301(a) (authorizing the President to establish national monuments "on land owned or controlled by the Federal Government"); Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996) (establishing the Grand Staircase-Escalante National Monument in the State of Utah, reserving "approximately 1.7 million acres" of "Federal land"). And so, consistent with *Kane III*, we conclude that the *scope* determination, unlike the title determination, implicates the United States' "broad-ranging and competing interests." *Kane III*, 928 F.3d at 896.

2. Relief versus interest

In ruling that "SUWA's interests [on scope] are adequately protected" by the United States, the district court emphasized that the United States (1) has "asserted it intends to argue for the narrowest width possible if any right-of-way is established in [Kane County's] favor" and (2) has "not acted contrary to its representations" during or after trial. *Kane (2)*, 606 F. Supp. 3d at 1154. In the district court's view, "SUWA can ask for no more." *Id.* In a similar vein,

Kane County asserts that the United States adequately represents SUWA's interests in this lawsuit because both parties seek the same "relief." K.C. Br. at 53. But as we reasoned in *Kane III*, "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." 928 F.3d at 895 (citations omitted and emphasis added). Moreover, even if the United States and SUWA are pursuing the same form of *relief* for purposes of piggyback standing,[20] that does not render their *interests* identical under Rule 24(a)(2). *Id.* at 887 n.13 (collecting cases). "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 . . . ." *Id.* We decline to equate relief and interests.

At bottom, the pertinent inquiry is not whether SUWA and the United States are pursuing the same relief—we accept that they are—but instead is whether they have *identical* interests in pursuing that relief. We turn to that question next.

3. SUWA's and the United States' Interests

[20] In *Town of Chester v. Laroe Estates, Inc.*, the Supreme Court modified the "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. 581 U.S. 433, 435 (2017) (emphasis added).

In *Kane III* we determined that SUWA and the United States have "conflicting interests" in the scope determination. 928 F.3d at 895. This was not novel. As far back as *San Juan County*, a majority of this court recognized that if title is settled in favor of Kane County, then the United States "may wish to compromise with the County concerning use of the road." 503 F.3d at 1207; *see also Kane I*, 597 F.3d at 1135 (anticipating that "SUWA and the United States might disagree as to the potential scope of Kane County's purported rights-of-way," but that SUWA had waived such an argument "for purposes of this appeal").

Here, the parties do not contend that their interests have shifted since *Kane III* or between *Kane (1)* and *Kane (2)*. Despite *Kane III*'s pronouncement that "SUWA's and the United States' interests are not identical" on the issue of scope, 928 F.3d at 895, the district court considered their interests as "harmonious" enough that the United States adequately represented SUWA's interests on scope, *Kane (2)*, 606 F. Supp. 3d at 1153.

The district court reasoned that "SUWA's objectives and interests in this litigation are the same as the United States" because "if title is found in favor of [Kane County] for any" right-of-way, SUWA and the United States "seek for that right-of-way to be as narrow as possible." *Id.* To the district court, this meant that "any interests SUWA may have are still *adequately* represented by the United States." *Id.* at 1153–54. But as discussed above, this reasoning improperly equates the distinct concepts of relief and interests.

Another problem with the district court's adequacy-of-representation determination is that Rule 24(a)(2) requires that the interests of SUWA and the United States be *identical*, not just "harmonious." *Id.* at 1153. Indeed, the Supreme Court has declared that "[w]here 'the absentee's interest is similar to, but not *identical* with, that of one of the parties,' that normally is not enough to trigger a presumption of adequate representation." *Berger*, 597 U.S. at 197; *see id.* at 198 (concluding that under Rule 24(a)(2), the intervening party's interests were not "identical" to the current party, though both were defending the constitutionality of the disputed state law, because the intervenor "s[ought] to give voice to a different perspective" and had a different "primary objective" than the current party); *accord Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula*, 41 F.4th 767, 777 (6th Cir. 2022) ("[O]verlapping interests do not equal convergent ones for the purposes of assessing representation under Rule 24(a)."); *see also, e.g.*, *La Union del Pueblo v. Abbott*, 29 F.4th 299, 308-09 (5th Cir. 2022) (finding inadequate representation under Rule 24(a)(2)) (expounding that despite the intervenor-affiliate group and current government-party sharing the "same objective" of defending the constitutionality of a statute, the affiliate-group's interests were "less broad than those of the governmental defendants" and "different in kind from the public interests of the State or its officials"); *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014) (concluding same) (observing that though Louisiana and the parent-intervenors both sought to defend the state's school voucher program, Louisiana had

"extensive interests to balance" in defending its school voucher program, while the parent-intervenors' "only concern [wa]s keeping their vouchers"); *Planned Parenthood of Minnesota, Inc. v. Citizens for Cnty. Action*, 558 F.2d 861, 870 (8th Cir. 1977) (concluding same) (articulating that despite the intervenor and representative parties being "interested in upholding the constitutionality of the ordinance" that their "respective interests, while not adverse, [were] disparate").

Because, as in *Kane III*, SUWA's interests are not "identical" to the United States' interests, we conclude that "no presumption of adequate representation applies." 928 F.3d at 895. And so, "given our court's relaxed intervention requirements in cases raising significant public interests such as this one, and our liberal approach to intervention, we hold that SUWA has [again] satisfied its minimal burden of showing that the United States may not adequately represent its interests" on scope in the *Kane (2)* litigation. *Id.* at 896–97 (cleaned up); *see id.* at 894 ("For a proposed intervenor to establish inadequate representation by a representative party, 'the possibility of divergence of interest need not be great,' and this showing 'is easily made' when the representative party is the government." (first quoting *Nat. Res. Def. Council*, 578 F.2d at 1346; and then quoting *Clinton*, 255 F.3d at 1254)).[21]

[21] In *Kane III* we ruled that "even if" the presumption applied, SUWA would have rebutted it. 928 F.3d at 895. Because we have concluded that no presumption applies in this case, we need not consider whether SUWA could overcome such a presumption.

4. Rule 1 of the Federal Rules of Civil Procedure

Finally, the district court theorized that even if SUWA had satisfied the requirements of intervention under Rule 24(a)(2), Rule 1 of the Federal Rules of Civil Procedure might still provide grounds for denying intervention. *Kane (2)*, 606 F. Supp. 3d at 1155–56. Rule 1 states that the civil rules are to "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." We sympathize with district court judges hearing cases involving multiple parties and multiple lawyers. But we liken this case to *Berger*, where the Court stated that, "[w]hatever additional burdens adding [the intervenor] to this case may pose, those burdens fall well within the bounds of everyday case management" in cases involving multiple parties. 597 U.S. at 199–200 (rejecting the argument that allowing intervention could "make trial management impossible" (citation omitted)). We further note that we have found no caselaw using Rule 1 to deny intervention to a party that has satisfied Rule 24(a)(2)'s requirements. Having already concluded that SUWA has satisfied such requirements, we reject the contention that Rule 1 precludes intervention in this case.

* * *

Because this case is materially indistinguishable from *Kane III*, along with the reasons discussed above, we hold that the district court's order contravenes *Kane III* and thus its denial of SUWA's motion to intervene on the

issue of scope was error. This conclusion stands despite our agreeing with Kane County and the district court that *Kane III* did not grant SUWA a "*per se* right to intervene in all R.S. 2477 cases." K.C. Br. at 43–44 (quoting *Kane (2)*, 606 F. Supp. 3d at 1142 n.6). Nor do we suggest that *Kane III* "mandate[s] that courts in this circuit allow SUWA—and every other environmental, recreational or other special interest group . . . to intervene in every road case in which it seeks to intervene." K.C. Br. at 43. The intervention inquiry is, indeed, "a highly fact-specific determination." *San Juan Cnty.*, 503 F.3d at 1197 (citation omitted). So in cases in which the material facts, the parties, and the legal issues differ from those in *Kane III*, the result might differ, too. But where, as here, there is no "material difference in fact," U.S. Br. at 45, between this case and *Kane III*, *Kane III* controls.

We now turn to the matter of whether SUWA's interests are adequately represented on the issue of *title*.

B. The United States adequately represents SUWA's interests on the issue of title.

In *Kane I* this court ruled that the United States adequately represents SUWA's interest on the issue of title. 597 F.3d at 1135; *accord Kane III*, 928 F.3d at 894 ("SUWA and the United States ha[ve] identical interests in the title determination . . . ."). Acknowledging our holding in *Kane I*, SUWA asserts that we still should allow it to intervene in *Kane (2)* on the issue of title. But *Kane I* binds this panel, *Arostegui-Maldonado*, 75 F.4th at 1142; and we

agree with the reasoning of that opinion. We accordingly reject SUWA's arguments asking us to overrule binding precedent, and we affirm the district court's order denying SUWA intervention on the issue of title.

CONCLUSION

Consistent with our holdings in *Kane I* and *Kane III*, we reverse the district court's denial of SUWA's motion to intervene on the issue of scope, affirm on the issue of title, and remand for further proceedings in accordance with this opinion.

No. 22-4087, Kane County, Utah et al. v. United States of America, et al.

KELLY, Circuit Judge, concurring.

Based upon Kane County v. United States (Kane III), 928 F.3d 877 (10th Cir. 2019), I am compelled to agree that the district court's denial of SUWA's motion to intervene on the issue of scope is reversible.

That said, I agree with the government that Kane III's distinction between title and scope in quiet title actions does not comport with our precedent and is not analytically sound. Aplee. Br. (U.S.) at 57–60. When it comes to title, SUWA has no interest that qualifies it to act as a party in this litigation which differs from the interest that any hiker or off-road vehicle enthusiast would have. SUWA could not bring a quiet title action against the United States nor could SUWA be a defendant in a quiet title suit over the roads at issue in this litigation, as it has no property interest of its own at stake. A quiet title action simply does not involve questions of federal land management, see N. Dakota ex rel. Stenehjem v. United States, 787 F.3d 918, 921 (8th Cir. 2015), and the government has the exclusive right to defend its title — and by extension, the scope — of any right-of-way, see San Juan Cnty. v. United States, 503 F.3d 1163, 1215–16 (10th Cir. 2007) (en banc) (McConnell, J., concurring); Aplee. Br. (U.S.) at 45–48.

The United States and SUWA share identical objectives as to title: defending the government's title and minimizing any rights-of-way across federal land. See Kane Cnty. v. United States, 950 F.3d 1323, 1334–36 (10th Cir. 2020) (Tymkovich, C.J., dissenting from denial of reh'g en banc). As the district court observed (and through whatever steps

crafted by this court to divide the inquiry), "ownership and scope are the two sides of the same coin that comprises title." VIII Aplt. App. 2304–05.

Moreover, despite Federal Rule of Civil Procedure 24(a)(2)'s mandate to consider "practical matter[s]" regarding intervention as of right, Kane III results in an impractical (or remarkably inefficient) case management situation. The parties agree that title and scope are not neatly divisible. As SUWA notes: "The same evidence and arguments underlie both the title and scope determinations, and there is no practical way to split up discovery, trial, and litigation into 'title' and 'scope.'" Aplt. Reply Br. at 20. And as the government explains: "The district court cannot find the existence of a right-of-way without defining its scope." Aplee. Br. (U.S.) at 58; accord Aplee. Br. (Utah & Kane County) at 44. The court should revisit the unworkable construct it has created. See San Juan Cnty., 503 F.3d at 1209–10 (Kelly, J., concurring).

FILED
United States Court of Appeals
Tenth Circuit

September 3, 2024

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KANE COUNTY, UTAH, a Utah political subdivision,

Plaintiff - Appellee,

STATE OF UTAH,

Intervenor Plaintiff - Appellee,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee,

and

SOUTHERN UTAH WILDERNESS ALLIANCE; SIERRA CLUB; THE WILDERNESS SOCIETY; GRAND CANYON TRUST,

Intervenor Defendants - Appellants.

No. 22-4087
(D.C. No. 2:10-CV-01073-CW)
(D. Utah)

ORDER

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

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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 Petitions.

This matter is before the court on petitions for rehearing en banc filed by the United States; the State of Utah; and Kane County, Utah ("Petitions"). We also have a response from Appellants.

The Petitions and response were circulated to all non-recused judges of the court who are in regular active service. A poll was called and resulted in a tie. Consequently, the Petitions 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).

Judges Hartz, Tymkovich, Eid, Carson, and Federico voted to grant the Petitions. Judge Phillips has filed a separate concurrence in the denial of en banc rehearing. Judges Hartz and Tymkovich have each written separately in dissent. Judge Tymkovich's dissent is joined by Judges Kelly, Eid, Carson, and Federico.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

No. 22-4087, *Kane County, et al. v. United States of America, et al.*

PHILLIPS, 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 2019, a panel of this court ruled that Southern Utah Wilderness Alliance (SUWA) had the right, pursuant to Federal Rule of Civil Procedure 24(a)(2), to intervene in the ongoing R.S. 2477 litigation in Kane County, Utah. *Kane Cnty. v. United States* (*Kane III*), 928 F.3d 877 (10th Cir. 2019). The United States, Kane County, and the State of Utah sought en banc review of that 2019 intervention decision, which this court denied. *Kane Cnty. v. United States*, 950 F.3d 1323 (10th Cir. 2020) (mem.).[†] Our en banc denial reflected our view that the 2019 decision did not "conflict[] with a decision of the United States Supreme Court or . . . this court," and indicated our belief that the issues presented were not of "exceptional importance" under Rule 35.1(A).

Now, the United States, Kane County, and the State of Utah seek review of a 2024 panel decision involving the same parties raising the same issues and interests—but

[†] The United States, Kane County, and the State of Utah unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. *Kane Cnty. v. United States*, 141 S. Ct. 1283 (2021).

different alleged rights-of-way—as were at issue in *Kane III*. The panel concluded that SUWA was entitled to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. *See Kane Cnty. v. United States* (*Kane IV*), 94 F.4th 1017 (10th Cir. 2024). In so ruling, the panel merely applied this court's circuit precedent, unanimously agreeing that we were bound by *Kane III* in our disposition of a materially indistinguishable appeal. *See id.* at 1035 (Kelly, J., concurring) ("Based upon [*Kane III*] . . . the district court's denial of SUWA's motion to intervene on the issue of scope is reversible.").

The petitions now before us seeking en banc review of *Kane IV* do not dispute *Kane III*'s binding authority over the *Kane IV* panel. Nor do they challenge the majority opinion's application of that precedent to this case. What's more, petitioners fail to identify any differences between this case and *Kane III* that would render their near-identical arguments—that we previously rejected—deserving of the "disfavored" and "extraordinary procedure" of en banc review. 10th Cir. R. 35.1(A). Instead, in seeking en banc review, the United States, Kane County, and the State of Utah simply wish to reassert their view of perceived flaws in the *Kane III* decision. But what was true when we denied en banc review of the *Kane III* decision is true now: The issues presented in this case do not satisfy the standard governing en banc consideration. And particularly in this case, I take issue with petitioners' attempt to exploit this court's en banc procedure to revive arguments that they lost years ago.

For these reasons, I respectfully submit that the court appropriately denied en banc review in this case.

No. 22-4087, *Kane County, et al. v. United States of America, et al.*

HARTZ, Circuit Judge, dissenting from the denial of rehearing en banc.

There is a great deal of litigation in the West regarding rights-of-way over federal land. Every level of government and numerous people and groups are interested in the outcome. Management of the litigation could be quite burdensome if all who wished to intervene were permitted to do so. Even litigation over who is allowed to intervene can, and has been, a severe drain on the courts. The intervention issue is not a simple cut-and-dry matter. Judge Tymkovich's dissent from the denial of rehearing en banc raises strong arguments that deserve the attention of the court. I, for one, would greatly benefit from further exploration by the parties and the court of the legal nuances and pragmatic consequences of intervention in these cases. It is striking to me that, as Judge Tymkovich points out, every level of government—local, state, and federal—opposes intervention in this case. I therefore voted to rehear this matter en banc and dissent from the denial of such rehearing.

No. 22-4087, *Kane County, et al. v. United States of America, et al.*

TYMKOVICH, Circuit Judge, joined by **KELLY**, **EID**, **CARSON**, and **FEDERICO**, Circuit Judges, dissenting from the denial of rehearing en banc.

The panel majority concluded that various environmental groups (SUWA) have the right to intervene in a property dispute between the United States and Kane County, Utah, because the United States does not adequately represent their interests. I continue to believe that (1) the intervenors lack a concrete injury, and thus lack standing, and (2) the United States will adequately represent SUWA's interests at trial. To the extent the intervention applicants have something to contribute to this case, they can do so as amici curiae.

This is the rare case where every level of government—federal, state, and local—is aligned. That makes it an exceptional candidate for en banc review, especially when intervention will greatly undermine the administrability of thousands of pending cases. Our denial of en banc review cut off the opportunity for the United States, Utah, and Kane County to explain the downsides of intervention in these cases.

I therefore respectfully dissent from the denial of en banc rehearing.

The Federal Rules of Civil Procedure require courts to permit a party to intervene in a case if he "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) (emphasis added). The parties in this case concede that SUWA has an interest that this proceeding might impair,

"[s]o the only issue in dispute is whether the district court erred in concluding that the United States adequately represents SUWA's interests." *Kane County v. United States ("Kane IV")*, 94 F.4th 1017, 1030 (10th Cir. 2024).

The panel applies the wrong test for determining adequate representation and, contrary to our precedents, did not require the intervention applicants to show that the United States could not adequately represent their interests. The result is a nearly irrebuttable presumption in favor of intervention for cases that "raise significant public interests"—a presumption that will knee-cap the government's ability to litigate civil cases implicating public policy.

To determine whether SUWA's interests are adequately represented, our starting point is the subject of the action. This action addresses title to thousands of historical rights of way across federal land, so-called RS 2477 rights of way. *Kane IV*, 94 F.4th at 1022. Quieting title does not bring any new rights into existence nor require evaluation of the public interest. It requires a historical inquiry into pre-1976 land use to clarify existing property rights. The district court's final determination of title does not change land management or status. The only issue at trial is the length and width of Kane County's easements.

SUWA presents no sufficient reason to doubt that 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 unless allowed intervention. The United States, moreover, seeks rights-of-way that are the narrowest possible based on the historical evidence.

As the panel opinion notes, we presume adequate representation "[w]hen a would-be intervenor's and the representative party's interests are 'identical.'" *Kane IV*, 94 F.4th at 1030 (citing *Bottoms v. Dresser Industries, Inc.*, 797 F.2d 869, 872 (10th Cir. 1986)). The panel concedes that SUWA seeks the same relief as the United States: restricting Kane County's rights of way to "the narrowest width possible." *Id.* at 1032. But relying on our precedent in *Kane III*, it concludes that the identical litigation objective is insufficient to show adequate representation since the parties have different motivations. *Id.* (citing *Kane County v. United States ("Kane III")*, 928 F.3d 877, 895 (10th Cir. 2019)). It therefore focused its inquiry on whether the United States and SUWA "ha[d] identical interests in pursuing [the same] relief"—in other words, the same ultimate motivation—rather than whether they shared an identical objective. *Id.* This is the wrong question to ask.

In determining whether existing parties adequately represent an intervention applicant's interests, we have always considered the parties' identical litigation objectives as opposed to their ultimate motivations in reaching those objectives. For example, we denied intervention in *City of Stilwell v. Ozarks Rural Electric Cooperative*, reasoning that "[w]hile KAMO's ultimate motivation in this suit may differ from that of Ozarks, its objective is identical." 79 F.3d 1038, 1043 (10th Cir. 1996). We emphasized that representation is adequate "when the objective of the applicant for intervention is identical to that of one of the parties." *Id.* (citing *Bottoms*, 797 F.2d at 872). Later, in *Tri-State Generation & Transmission Ass'n*, we clarified our view that similar "interests" refers to litigation objectives rather than ultimate motivations, reasoning that "even

though a party seeking intervention may have different ultimate motivations from the governmental agency, where its objectives are the same, we presume representation is adequate." 787 F.3d at 1072-73 (internal quotation marks and brackets omitted). *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.").

Since SUWA shares identical litigation objectives with the federal government, "we presume adequate representation." *Kane IV*, 94 F.4th at 1030 (citing *Bottoms* 797 F.2d at 872). That conclusion should have ended the inquiry. Instead, the opinion sidestepped this outcome with the novel conclusion that SUWA had to show identical ultimate motivations.

Even if we concluded that no presumption against intervention applied, the intervention applicants would bear the burden of establishing that the existing litigants did not adequately represent their interests. *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 844 (10th Cir. 1996). The majority opinion deviates from our precedent by concluding that *inadequacy* of intervention is presumed in certain cases.

Although the intervention applicant's burden is "minimal" and "[t]he possibility of divergence of interest need not be great" to satisfy this burden, we have always required applicants for intervention to make some factual showing of inadequacy. *Id.* "Whether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination." *Id.* at 841. For instance, we found that the United

States inadequately represented an intervenor's interest due to its reluctance to pursue certain claims, *see id.* at 845 (noting that the Department of the Interior's reluctance to protect the spotted owl suggested that its interests diverged from the intervenor's), its unwillingness to take a position on whether it would support the applicant's interest, *see Utah Ass'n of Cnties. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) (finding the United States' silence on whether it would represent the applicant's interest "deafening"), or its outright admission that it may not share the same interests as an intervenor, *see WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996-997 (10th Cir. 2009) (finding representation inadequate when government conceded that its interests could diverge from those of the objectors). We have never permitted a party to intervene in the absence of facts in the record showing that the existing parties would not continue to represent the applicant's interests.

The opinion departs from these precedents. In concluding that the United States inadequately represents SUWA's interests, the panel reasoned that since "SUWA's interests are not 'identical' to the United States' interests . . . no presumption of adequate representation applies." *Kane IV*, 94 F.4th at 1033. And since no presumption of adequate representation applied, and the case "rais[ed] significant public interests," intervention was permitted. *Id.* at 1033-1034. Almost all of our intervention precedents "raised significant public interests." *See Nat'l Farm Lines v. Interstate Com. Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) (permitting intervention in a suit challenging the constitutionality of an Interstate Commerce Act provision); *Coal. of Ariz./N.M. Ctys.*, 100 F.3d at 845 (permitting intervention in a suit challenging the Fish and Wildlife Service's

classification of the spotted owl as threatened); *Utah Ass'n of Cnties.*, 255 F.3d at 1254–56 (permitting intervention in a suit challenging the establishment of Grant Staircase Escalante National Monument); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002) (permitting intervention in a suit seeking vacatur of the Department of Transportation's approval of a regional transportation plan); *WildEarth Guardians*, 573 F.3d at 996-997 (10th Cir. 2009) (permitting intervention in a suit challenging the Forest Service's approval of plans for venting methane gas from a coal mine); *and Western Energy Alliance v. Zinke*, 877 F.3d 1157, 1168–69 (10th Cir. 2017) (permitting intervention in suit challenging the Bureau of Land Management's policies for selling oil and gas leases). In each of these cases, we required intervention applicants to show that the existing parties did not adequately represent their interests.

In a departure from these precedents, the opinion cites no evidence in the record suggesting that the United States would fail to defend SUWA's interests. Instead, it creates a nebulous near-per se rule that whenever litigants seek to intervene in a case that "raises significant public interests"—whether it is a challenge to public policy, a dispute over public lands, or a regulatory enforcement suit—they may intervene in the suit without having to show that their interests diverge from those of the government. If a case "raises significant public interests," it will almost certainly affect private interests as well, leaving Rule 24(a)(2)'s last requirement as the only meaningful barrier against intervention.

The ultimate consequence of removing that barrier is to replace the Department of Justice, as sole representative of the United States' interests, with a coterie of private

attorneys general, each of whom could undermine the efficient resolutions of these cases. The net effect in this case is that every hiker, dirt-biker, four-wheeler, and land-use enthusiast can join the litigation if they satisfy minimal standing requirements.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

KANE COUNTY, UTAH (2), (3), and (4), a Utah political subdivision; and STATE OF UTAH,

Plaintiffs (or Plaintiff-Intervenor, as to State of Utah in Kane County (2)),

v.

UNITED STATES OF AMERICA,

Defendant,

and

SOUTHERN UTAH WILDERNESS ALLIANCE et al.,

Defendant-Intervenors.

MEMORANDUM DECISION AND ORDER DENYING SUWA'S FIFTH MOTION TO INTERVENE AS OF RIGHT and RETAINING FOURTH AMENDED PERMISSIVE INTERVENTION ORDER

Consolidated Case No. 2:10-cv-1073-CW[1]

(Consolidated with Case Nos. 2:11-cv-1031-CW and 2:12-cv-476-CW)

Judge Clark Waddoups

Docket also in the following Case Nos:

1:12-cv-105	2:12-cv-451
2:10-cv-1073	2:12-cv-452
2:11-cv-1043	2:12-cv-461
2:11-cv-1045	2:12-cv-462
2:12-cv-423	2:12-cv-466
2:12-cv-425	2:12-cv-467
2:12-cv-428	2:12-cv-471
2:12-cv-429	2:12-cv-472
2:12-cv-434	2:12-cv-477
2:12-cv-447	

[1] All "ECF No." references in this memorandum decision refer to docket entries in **Case No. 2:10-cv-1073**, unless otherwise noted. Additionally, when referring to a page number, the court references the ECF page numbering at the top of the page and not the numbering at the bottom of a document.

INTRODUCTION

On March 6, 2020, a mandate issued from the Tenth Circuit Court of Appeals that allowed SUWA[2] to intervene as of right on the issue of scope in *Kane County (1)*, *Utah v. United States*, No. 2:08-cv-315) (D. Utah) (hereinafter "*Kane County (1)*").[3] Based on that ruling in *Kane County (1)*, SUWA has now filed a fifth motion to intervene as of right[4] in this case—*Kane County (2)*—on the issues of title *and* scope.

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[2] Unless otherwise specified, "SUWA" collectively refers to the Southern Utah Wilderness Alliance, The Wilderness Society, and the Sierra Club.

[3] The Tenth Circuit ruled twice before that SUWA could not intervene as of right in *Kane County (1)*. *See Kane County v. United States*, 597 F.3d 1129 (10th Cir. 2010); Order, at 2 (Sept. 2, 2014) (Appellate Case Nos. 13-4110, 13-4109, 13-4108). Thus, the *Kane County (1)* decision now referenced by SUWA was the Tenth Circuit's third decision on the matter, which citation is *Kane County (1) v. United States,* 928 F.3d 877 (10th Cir. 2019). For simplicity, however, the court will simply refer to it herein as the "*Intervention Ruling*."

[4] SUWA has filed five motions to intervene on the docket for *Kane County (2)* as follows:

- On April 22, 2013, SUWA filed an entry on the *Kane County (2)* docket moving to intervene in *Kane County (3)* (ECF No. 103). Four days earlier, the court had consolidated and merged *Kane County (3) v. United States*, 2:11-cv-1031 into *Kane County (2) v. United States*, 2:10-cv-1073. Order, at 3 (ECF No. 91); *see also* Order, at 1 n.2 (ECF No. 181) (explaining function of local rule DUCivR 42-1(b) that, "upon consolidation, a merger occurs with the lower-numbered case and the higher numbered case is closed"). Because the two cases were merged and consolidated, a separate motion to intervene was unnecessary, but it was one of the motions to intervene the court has had to address in this case.

- SUWA filed a second Motion to Intervene on April 23, 2013 (ECF No. 105).

- SUWA filed a Renewed Motion to Intervene on May 25, 2018 (ECF No. 410), which should have only been lodged as discussed later in this memorandum decision.

- SUWA filed a fourth Motion to Intervene on July 10, 2019 (ECF No. 516).

- After the fourth motion was terminated as moot, on July 25, 2019, SUWA then filed a motion to obtain full participation or to revive its fourth Motion to Intervene (ECF No. 530). On September 5, 2019, the court decided the motion to obtain full participation

Intervention as of right has serious effects. Courts have allowed one who cannot bring a claim or defense on its own to enter a suit and obtain the right to "conduct discovery, participate fully at trial, and pursue an appeal in the event of an adverse judgment." Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 274–75 (2020) (hereinafter, "Nelson"). Despite the importance of intervention law, one professor has accurately noted, "the law governing motions [to intervene] is a mess." *Id.* at 274.

In this case, the State of Utah and Kane County assert title to certain roads that cross federal land. Although the roads at issue came into existence before SUWA did,[5] SUWA nevertheless asserts it has rights that will be infringed if it is not permitted to intervene as of right. Indeed, SUWA contends its rights are so important that the United States, as the sovereign landowner, cannot possibly defend title and scope adequately without SUWA's involvement.

This case, however, is now at the post-trial stage. Throughout the proceedings in this case, the United States has vigorously defended against Plaintiffs' claims to title. During a three-week bench trial, the court observed that very defense, which the United States put on through multiple attorneys. In its post-trial briefing, the United States seeks dismissal of *every* bellwether road in this case on jurisdictional grounds. *See* United States' Amended Motion to Dismiss (ECF No. 671). To the extent jurisdiction is found, the United States has not conceded title to a single road

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and the fourth Motion to Intervene on the merits. Mem. Dec., at 2–3 (ECF No. 549), *also located at Kane Cnty., Utah (2), (3), & (4) v. United States*, 333 F.R.D. 225, 228–29 (D. Utah 2019).

- Shortly after the start of the pandemic, on April 6, 2020, SUWA filed its fifth Motion to Intervene (ECF No. 607), which is the motion now before the court.

[5] This reference to SUWA pertains only to the Southern Utah Wilderness Alliance, and its late entry into R.S. 2477 matters will be addressed further below.

and is arguing for the narrowest width it can under the law. *See* United States' Proposed Findings of Fact and Conclusions of Law (ECF No. 677). SUWA's interests have been, and continue to be, adequately represented by the United States in this case.

SUWA also seems to imply that because the Tenth Circuit allowed SUWA to intervene as of right in *Kane County (1)*, this court also must allow SUWA to intervene as of right in this case and, by extension, all other R.S. 2477 cases. While the court respects the Tenth Circuit's *Intervention Ruling*, SUWA's contention does not appear to be in harmony with it.

Under Tenth Circuit precedent, one panel cannot overrule another panel; nor may a panel overrule an *en banc* ruling. *Burlington N. & Santa Fe Ry. Co. v. Burton*, 270 F.3d 942, 947 (10th Cir. 2001) (citing *United States v. Morris*, 247 F.3d 1080, 1085 (10th Cir. 2001)) (stating a panel "cannot overrule the judgement of another panel of this court absent en banc reconsideration or a superseding contrary decision by the Supreme Court"); *see also United States v. Goines*, No. 20-3183, 2021 WL 4544098 (10th Cir. Oct. 5, 2021) (citing *United States v. Manzanares*, 956 F.3d 1220, 1225 (10th Cir. 2020)) (same). Because an *en banc* panel has concluded SUWA does not have a *per se* right to intervene in R.S. 2477 cases, the court does not read *Kane County (1)* as establishing a contrary ruling.[6] Moreover, *Kane County (1)* is distinguishable from this case. Accordingly, the court again denies SUWA intervention as of right.

[6] If the court has misread the *Kane County (1)* decision, such that SUWA now has a *per se* right to intervene in all R.S. 2477 cases, the court invites the Tenth Circuit to so state. As stated above, SUWA has now moved multiple times to intervene in this case. Answering the same question repeatedly drains the court's resources.

BACKGROUND

This court has been assigned *Kane County (1)*, which was filed in 2008, and *Kane County (2)*, which was filed in 2010. Both cases involve R.S. 2477 road issues. In 2013, this court also was assigned to do case management[7] on about twenty other R.S. 2477 cases pending in this district (the "Road Cases"). *See* Case Mgmt. Order (ECF No. 78).[8] Throughout all of this litigation, this court has had interaction with SUWA. It knows of SUWA's actions from the time it first sought to intervene in these R.S. 2477 road cases, which knowledge informs this decision.

STANDING

I. PIGGYBACK STANDING

"'One essential aspect of [a court's jurisdiction] is that any person invoking the power of a federal court must demonstrate standing to do so.'" *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)). Thus, "[a]ny party, whether original or intervening, that seeks relief from a federal court must have standing to pursue its claims" or defenses. *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007). With respect to a person seeking entry as an intervenor, the United States Supreme Court has clarified that "[f]or all relief sought, there must be a litigant with standing. . . . Thus, *at the least*, an intervenor of right must demonstrate Article III standing when it seeks

[7] The next bellwether trial will be in a different case and handled by a different judge in this district. Presently, however, case management on non-substantive matters remains with this court.

[8] Because Kane County filed its cases before the others, it was on a different path. Consequently, it was not subject to the case management order, but the *Kane County (2)* case number has been listed in captions involving case management orders due to the State of Utah's role.

additional relief beyond that which the [original party] requests." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (emphasis added).

In the *Intervention Ruling*, the majority addressed whether piggyback standing was still permitted, such that SUWA could "'piggyback' upon the standing of [the United States] to satisfy the standing requirement." *Dillard*, 495 F.3d at 1330. The majority distinguished prior Tenth Circuit and Supreme Court cases, and concluded that piggyback standing is still allowed, as long as an intervenor does not seek relief different from the original party. *Kane County (1)*, 928 F.3d at 886–87. Because the United States represented in *Kane County (1)* that it was seeking "retention of the maximum amount of property" and "the smallest [road] widths it can based on the historical evidence," the majority concluded SUWA and the United States were seeking the same relief. *Id.* at 887 (quotations, citations, and alteration omitted). Accordingly, the majority held that SUWA had satisfied the standing requirements.

Based on the *Intervention Ruling*, as long as SUWA does not seek relief different from the United States, SUWA also has piggyback standing in *Kane County (2).*

II. ARTICLE III – CONSTITUTIONAL STANDING

A. Majority's Conclusion in *Kane County (1)*

The majority in the *Intervention Ruling* also concluded that SUWA had "establish[ed] its own independent standing." *Intervention Ruling*, 928 F.3d at 888. For constitutional standing, a party must 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.

Id. (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

The majority found that SUWA had "established an imminent injury" because the plaintiffs in *Kane County (1)* are "seek[ing] to double the width of" two dirt roads and "more than double the width" of a third road. The majority then concluded:

(1) "Wider roads will likely require realignments or improvements, such as grading or paving."

(2) "Such widening and improvement of the roads in a scenic area would almost inevitably increase traffic, diminishing the enjoyment of the nearby natural wilderness," and

(3) These injuries were not speculative because a project that realigns, widens, and significantly improves a road "accommodate[s] large increases in future traffic"

Id. at 888 (quotations and citations omitted). Each point made by the majority had as its premise that the State and County were seeking to make the roads wider.

A word often is susceptible to multiple meanings in the English language. It appears that the majority envisioned something different than what is before this court in *Kane County (1)*. In the underlying *Kane County (1)* case, this court concluded that the scope of the *rights-of-way* for three roads was wider than the travel surfaces of those roads. *Kane Cnty., Utah (1) v. United States*, No. 2:08-CV-00315, 2013 WL 1180764, at *64–65 (D. Utah Mar. 20, 2013), *rev'd and remanded sub nom. Kane Cnty., Utah v. United States*, 772 F.3d 1205 (10th Cir. 2014). This court's opinion, however, did not increase the *travel surface* of the three roads. Instead, the width at issue in the underlying case pertained to the room needed to do the following:

> maneuver equipment, repair culverts, clear vegetation, obtain fill, and divert water to *maintain the roads to their present travel surface*. [Such room] further allows for shoulders along the road for emergency pull-offs and room to address any future realignments or

> other improvements needed to increase safety.
> . . .
>
> The court notes again that any such realignments or improvements would require consultation with the BLM before they are undertaken.

Id. at *64 & n.33 (emphasis added).

In *Kane County, Utah v. United States*, 772 F.3d 1205, 1223–24 (10th Cir. 2014), the Tenth Circuit reversed this court's width determination because it concluded the court had failed to base the width determination on pre-1976 uses and had allowed for unspecified future improvements. Upon remand, however, this court will not be determining if the travel surfaces for the three roads should or should not be widened. That issue is not before the court.[9] Instead, the issue is the length and width of the *right-of-way*, which may potentially include a width wider than the travel surface under existing law. Because *Kane County (1)* does not involve widening the travel surfaces of any of the three roads, it is difficult to discern why SUWA is presently facing imminent injury to its environmental interests from purported increased traffic on the roads.

Moreover, any such change to the width of the travel surface constitutes construction activities, and such construction activities must be reviewed by the United States before they commence. *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). Based on the time for review and outcome

[9] Although the State and County, on remand, are seeking for the rights-of-way to be wider than the travel surface, they have reaffirmed in briefing that it is a "false assumption . . . that if Plaintiffs' prevail all roads will be widened by the County and traffic will increase to the point of causing environmental harm." State's Mem. in Opp'n to Mot. to Intervene, at 3 (ECF No. 646). Moreover, widening the travel surface is also not the intent of Plaintiffs in *Kane County (2)*. *See* Kane County's Mem. in Opp'n to Mot. to Intervene, at 6 (ECF No. 649) (affirming in this case that Plaintiffs are not seeking to increase width or traffic on the roads).

of that review, any construction activities are not imminent. Additionally, whenever a NEPA analysis is involved due to a proposed improvement,[10] SUWA has a seat at the administrative table and pursues litigation on its own when it is dissatisfied with an administrative decision. Consequently, the majority's conclusion about SUWA's imminent injury is perplexing.

That said, in *Kane County (2)*, some of the bellwether roads are presently closed, and it is reasonable to infer that if title to any of the closed roads is vested in the State and Kane County, then the road(s) may be reopened. Moreover, reopened roads would lead to increased traffic on those roads. Even though this court disagrees that those factors are enough to establish Article III standing, based on how the majority applied such standing in the *Intervention Ruling*, the court concludes that SUWA has satisfied Article III standing in *Kane County (2)* as well.

III. PRUDENTIAL STANDING

Even if SUWA has Article III standing, Kane County contends that SUWA should be denied intervention because it lacks prudential standing. The dissent in the *Intervention Ruling* also addressed the issue and concluded SUWA lacked third-party standing. *Kane County (1)*, 928 F.3d at 901 (10th Cir. 2019) (Tymkovich, C.J., dissenting). The majority did not reach the issue. *Id.* at 886 n.9.

Third-party standing requires one to "'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Id.* at 900 (quoting *Kowalski v. Tesmer*, 543 U.S. 125 (2004)). An exception exists if one can show that it "'has a close

[10] Kane County is seeking review by the United States for approval of a chip seal project on the Skutumpah road. The scope of Skutumpah is still before the court in *Kane County (1)*. Kane County has informed the court it intends to raise that issue in *Kane County (1)*. Because the issue has not been briefed fully, the court lacks details about the project. It therefore cannot address that point here.

relationship with the person who possesses the right *and* there is a hindrance to the possessor's ability to protect his own interests.'" *Id.* (alteration omitted) (emphasis added) (quoting *Sessions v. Morales-Santana*, __ U.S. __, 137 S. Ct. 1678, 1689 (2017)).

In *The Wilderness Society v. Kane County, Utah*, 632 F.3d 1162, 1171 (10th Cir. 2011) (en banc), The Wilderness Society asserted it was "not suing based on the legal rights of a third party, the federal government's property rights, but rather [was] working to protect its conservation interests." (Quotations and citation omitted.) In response, the en banc panel stated, "[p]rudential standing imposes different demands than injury in fact. A party may suffer a cognizable injury but still not possess a right to relief." *Id.* (internal citations omitted). The panel then rejected that "alleged aesthetic or recreational injury" was sufficient to grant The Wilderness Society prudential standing. *Id.* at 1174. In particular, the panel found that, The Wilderness Society's protests to the contrary, it "obviously seeks to enforce the federal government's property rights in the disputed rights of way" based on the nature of the suit.

The court concludes the same applies here. SUWA was not the intended beneficiary of the R.S. 2477 or Quiet Title statutes and cannot sue or be sued under either on R.S. 2477 road claims. Scope, *as it pertains to determining the length and width of an R.S. 2477 right-of-way*,[11] also cannot be raised by SUWA in a separate lawsuit because it would be asserting or defending the

[11] The court emphasizes the above language to define the "scope" at hand because scope also is a word susceptible to multiple meanings. It has been used in the land use context to determine if a particular use falls with the scope of a right-of-way. Separate processes exist to address land use issues after title rights are determined. Whether SUWA may participate in those arenas is a separate standing issue than the one before this court. Here, the legal right or interest pertains only to ownership of rights-of-way and, if applicable, the legal description ("scope") of those rights-of-way.

rights of another. SUWA is therefore not asserting its own legal rights and interests as those terms are contemplated for prudential standing. Moreover, even if one could show a close relationship between the United States and SUWA, which the court is not finding, there is no ground to conclude that the United States is hindered in its ability to protect its own interest. Thus, the court concludes SUWA lacks prudential standing.

It is unclear, however, what the interplay is between piggyback standing and prudential standing. The court concludes it does not need to reach the issue because it will not alter the outcome of SUWA's motion to intervene.

HISTORICAL CONTEXT FOR R.S. 2477 ROADS

Before addressing the elements needed to intervene as of right, it is important to review the historical context that applies to R.S. 2477 roads and to SUWA.[12] It seems that a brief history of R.S. 2477 is stated in almost every decision involving an R.S. 2477 road. So often has it been repeated, that one may feel inclined to skip over it or skim it briefly. Yet, the property rights in R.S. 2477 cases are immersed in the past and may only be understood by placing the rights in historical context. If one does not carefully consider this context, then erroneous conclusions may be reached. The court therefore reviews this context anew.

[12] On September 5, 2019, the court issued a memorandum decision that addressed the history of the road cases and how that history informs SUWA's present rights. Mem. Dec. (ECF No. 549). Because the analysis is still important and applicable to the present motion, the court repeats much of it here and supplements it with additional facts and legal analysis to address SUWA's latest motion.

I. R.S. 2477 ROADS WERE WELCOMED AND NEEDED

The United States wanted to settle the west in the 1800's. Consequently, after the United States had expanded its boundaries to the Pacific Ocean, Congress passed a series of acts to encourage such settlement and development of the west. Among these were the Homestead Act of 1862 (granting lands for settlement), the Pacific Railway Act of 1862 (supporting development of a transcontinental railroad by granting lands), and the Morrill Act of 1862 (promoting development of public colleges by granting lands). Against this backdrop, "[i]n 1866, Congress passed an open-ended grant of 'the right-of-way for the construction of highways over public lands, not reserved for public uses.'" *S. Utah Wilderness All.*, 425 F.3d at 740 (quoting Mining Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866), *repealed by* Federal Land Policy Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743)). Such highways are now commonly referred to as R.S. 2477 roads, and "most of the transportation routes of the West were established under [R.S. 2477's] authority." *Id.* Indeed, "R.S. 2477 rights of way were an integral part of the congressional pro-development lands policy," and were "deemed a good thing." *Id.* at 740–41. The roads were welcomed and needed to carry out the United States' desire to settle the west.

For the 110-year-period between 1866 and 1976, the grant for the creation of highways remained in place until Congress passed the Federal Land Policy Management Act of 1976 ("FLPMA"). Although Congress changed its focus in 1976 to conservation and preservation, FLPMA nevertheless provided "that any valid R.S. 2477 rights of way existing" at the time of FLPMA's passage "would continue in effect." *Id.* at 741 (quotations omitted) (citing Pub. L. No. 94-579, § 701(a), 90 Stat. 2743, 2786 (1976)).

The court takes judicial notice that Kane County was founded in 1864 while Utah was still a territory. It was formed in the midst of the Acts discussed above to settle the west and establish roads across public lands. It would be illogical to conclude that no R.S. 2477 roads were established between 1866 and 1976 in Kane County. Kane County therefore has a legitimate interest in protecting any valid property rights it acquired during that time period.[13] Unfortunately, what "used to be a non-issue" with respect to these roads has now "become a flash point." *Id.* at 742. This action arises due to FLPMA's grandfathering provision and ensuing disputes.

II. ROADS EXISTING ON THE GROUND AS OF 1976

Because FLPMA grandfathered in existing property rights, Plaintiffs' suit is not about establishing new roads across public lands. It is about proving who the owner is of roads that *already exist on the ground*, as well as the scope of any existing right-of-way. For the State and County to prove they acquired these roads before FLPMA's passage, courts have required Plaintiffs to file a quiet title action under 28 U.S.C. § 2409a.

For a cause of action to lie under § 2409a, Plaintiffs must prove "(1) the United States 'claims an interest' in the property at issue; and (2) title to the property is 'disputed.'" *Kane Cnty., Utah*, 772 F.3d at 1210–11 (citation omitted). If Plaintiffs can pass that jurisdictional bar, they then must prove acceptance of the grant typically by public use or by mechanical means prior to

[13] It would be equally illogical to conclude that Kane County holds title to all 770 claims (approximately) it has made in its consolidated complaints. Thus, the United States has a legitimate interest in protecting its ownership of property rights that were retained and are exclusive to it. The parties recognize these truths and are seeking to sort out legal principles through a bellwether process that will guide the resolution of future roads in accordance with rights of the legitimate owner of the right-of-way.

October 21, 1976. The court makes the distinction between title arising under R.S. 2477 and title arising in another context.

The court references School and Institutional Trust Lands ("SITLA parcels") to illustrate this distinction. SITLA parcels are owned by the State of Utah. Some of the SITLA parcels are located within federal preservation areas. To ensure the State can make use of its SITLA parcels and that the BLM can maintain its priority preservation areas, at times, the State and the United States have entered into exchanges of property. One of the more recent exchanges occurred under the Utah Recreational Land Exchange Act of 2009. *See* Pub. L. No. 111-53, 123 Stat. 1982 (2009). It involved a present-day conveyance of title to parcels from one government to another in exchange for a corresponding conveyance of title to other parcels. The very nature of that title and scope exchange necessitated complex environmental analyses and cost studies before the exchange could be put into effect. One would anticipate competing interests being evaluated under such circumstances.

In contrast, R.S. 2477 issues do not involve the present day. They look to events that had to have occurred before October 21, 1976. No matter how vehemently a person may oppose a road in a certain area today, or how justified that vehemence is, those factors are irrelevant to the court's analysis. When determining title under R.S. 2477, the court does not consider anyone's present *interest* in land use issues or management, much less anyone's *competing interests*. Kane County is a hotbed for competing land interests. For every group that wants to preserve land, there is a competing group that wants the land open for development or recreation. Such competing interests cannot and do not inform the court's decision about who holds title to the property when that title arises under R.S. 2477. The specific R.S. 2477 title issue is simply not open for public

opinion or comment. Thus, the nature of the particular property dispute before the court informs whether SUWA has a right to participate in this action.

III. SCOPE IN THE R.S. 2477 CONTEXT

A. Scope of Review in *San Juan County*

In another R.S. 2477 road case, "[s]everal conservation groups . . . [sought] to intervene in a federal quiet-title action brought by San Juan County, Utah, against the United States," and other federal defendants. *San Juan County*, *Utah v. United States*, 503 F.3d 1163, 1167 (10th Cir. 2007) (en banc) (hereinafter "*San Juan*"). The conservation groups were collectively referred to as SUWA. *Id.* The district court had denied SUWA's application to intervene as of right and also denied SUWA permissive intervention. *Id.* at 1171. The district court stated, "the pleadings define the case in a very narrow fashion and the existence or non-existence of a right-of-way and *its length and its breadth* are matters which it seems to me are fact driven . . . . " *Id.* (citation omitted). After quoting this particular language, the *San Juan* en banc panel stated, "SUWA appeals this ruling." *Id.* Thus, the issue of title and scope were reviewed in the *San Juan* case and SUWA was nevertheless denied intervention.

B. Ownership and Scope

In the *Intervention Ruling*, the majority agreed "that scope is inherent in the quiet title process. After all, a right-of way must have a scope." *Kane County (1)*, 928 F.3d at 894 (quotations and citation omitted). It further stated, "the district court must determine title and scope in separate steps." *Id.* Judicial efficiency does counsel against reaching the issue of scope if ownership of a right-of-way has not been established, but evidence on both issues is typically presented in the same trial and without bifurcated proceedings. This is so because ownership and

scope are the two sides of the same coin that comprises title. Thus, when this court refers to title, it encompasses both elements.

Scope, in the R.S. 2477 context, means defining the length and width of the right-of-way so that the dividing line between one property and another is known. Indeed, in *Jeremy v. Bertagnole*, the Utah Supreme Court stated it is "proper *and necessary* for the court in defining the road to determine its width, and to fix the same according to what was reasonable and necessary, under all the facts and circumstances, for the uses which were made of the road." 116 P.2d 420, 423 (Utah 1941) (quotations and citations omitted) (emphasis added).

Although width is not limited to the actual travel surface (i.e., the "beaten path"), it is still bounded by pre-1976 uses. *Id.* at 423–24. The Court explained the boundaries as follows:

> A particular use having been established, such width should be decreed by the court as will make such use convenient and safe. A bridle path abandoned to the public may not be expanded, *by court decree*, into a boulevard. On the other hand, the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient width for safe and convenient use thereof by such traffic.

Id. at 424 (emphasis added).

The above confirms pre-1976 events fix in place the type of road that may be had and an approximate boundary for that road. R.S. 2477 and the Quiet Title Act, § 2904a are the sole statutes that govern the ownership and scope determinations. Other statutes that require balancing competing land use issues are not in play.

IV. HOW SUWA FITS INTO THE R.S. 2477 CONTEXT

Notably, even though this case is about title, SUWA is not a property owner. Unlike the original parties, SUWA has no claim of title to any of the roads at issue or even to the land on which the roads cross. This is significant because, based on historical events, all of the federal

land in which SUWA claims an environmental interest is subject to existing R.S. 2477 property rights. Whatever protectable interest SUWA may have, it emerged subject to those R.S. 2477 interests and cannot encroach upon them.

When Presidential Proclamation 6920 was issued to establish the Grand-Staircase-Escalante National Monument, it "expressly preserved all valid existing rights-of-way" within the Monument. *Kane County, Utah v. U.S.*, 934 F. Supp. 2d 1344, 1351 (D. Utah 2013), *affirmed in part and rev'd in part on other grounds*, 772 F.3d 1205 (10th Cir. 2014). When the Monument's management plan was developed, it stated:

> If claims are determined to be valid R.S. 2477 highways, the Approved Plan will respect those as valid existing rights. . . . Nothing in this Plan alters in any way any legal rights the Counties of Garfield and Kane or the State of Utah has [sic] to assert and protect R.S. 2477 rights, and to challenge in Federal court or other appropriate venue any BLM road closures that they believe are inconsistent with their rights.

Wilderness Soc'y, 632 F.3d at 1166 (alterations in original) (quoting Monument's Management Plan).

When FLPMA was passed, it directed the Secretary of the Interior to inventory federal lands to determine areas that were roadless and had wilderness characteristics.[14] *Kane Cnty., Utah*, 772 F.3d at 1216. When the Secretary designated a land as a wilderness study area ("WSA"), the Secretary then had "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.'" *Id.* (quoting 43 U.S.C. § 1782(c)).

[14] This was in harmony with the Wilderness Act of 1964 that sought to preserve wilderness areas containing at least five thousand areas of land. Pub. L. No. 88-577, 78 Stat. 890 (1964).

As stated above, however, FLPMA also required that all valid R.S. 2477 rights-of-way be grandfathered in and preserved for those who acquired them before October 21, 1976. The BLM reconciled these competing aspects of FLPMA by stating "roadless" areas for purposes of a WSA involve "roads" that are "not coterminous with a 'road' under R.S. 2477." *Id.* "[T]he BLM Director for Utah issued" the following clarification: "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 U.S.C. § 932) and is a definition for inventory purposes only, not for establishing rights of counties, etc. . . ." *Id.* (quoting Instruction Memorandum No. UT '80-240 (Mar. 6, 1980)).

Moreover, "[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.'" *Id.* at 1216–17 (emphasis added) (quoting Instructional Memorandum No. 90-589 (Aug. 15, 1990)). In each of the above instances, either Congress, the President, or the BLM balanced interests when setting forth the interplay between R.S. 2477 rights-of-way and any competing environmental considerations. And in each instance, the competing policy, economic, political, and environmental factors all are subject to valid, existing R.S. 2477 rights-of-way to such a point that they are not even considered in the R.S. 2477 analysis.

Perhaps this is better understood when one realizes that, at the time the R.S. 2477 roads were being established, the wilderness study areas that the BLM now manages in Kane County did not exist.[15] The Grand-Staircase-Escalante National Monument likewise did not exist at the

[15] Although the Wilderness Act of 1964 had already been passed, and Roadless Review Areas were under review, the Wilderness Act did not involve lands managed by the BLM. FLMPA altered that, and wilderness study areas became a focus post-1976 for BLM managed land.

time.[16] In fact, SUWA did not exist at the time R.S. 2477 roads were being established.[17] And no other defendant-intervenor in this action ever litigated the status of any road against Kane County or the State of Utah before 1976, as to whether a road should be opened, closed, or otherwise. *S. Utah Wilderness All.*, 425 F.3d at 741 (stating "all pre–1976 litigated cases involving contested R.S. 2477 claims (and there are dozens) were between *private landowners* who had obtained title to previously-public land and would-be road users who defended the right to cross private land on what they alleged to be R.S. 2477 rights of way") (emphasis added)). Only after any R.S. 2477 title had vested, did these things come into play. Hence, it is not surprising that whatever protectable interest SUWA has, the interest was taken subject to the title holder's interests, not the other way around.

With the historical context in mind, the court now turns to the elements needed to intervene as of right.

INTERVENTION AS OF RIGHT

Rule 24(a) of the Federal Rules of Civil Procedure sets forth the conditions for intervention as of right. SUWA must (1) "claim[] an interest relating to the property or transaction that is the subject of the action," and (2) be "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless [3] existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

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[16] The court takes judicial notice that the Monument was established in 1996.

[17] This particular reference to SUWA refers only to the Southern Utah Wilderness Alliance, and the court takes judicial notice SUWA was formed in 1983.

I. INTEREST RELATING TO PROPERTY AND IMPAIRMENT OR IMPEDIMENT OF THAT INTEREST

Intervention law has been inconsistently interpreted by the circuits, and unfortunately, the United States Supreme Court has provided little guidance about the "interest" prong for intervention as of right. Again, historical events are informative. Rule 24 was substantially modified in 1966, and that version is largely what is before the court today. The 1966 Advisory Committee Note specified how the amended rule was to be applied. Rule 24(a) was meant to follow "the reasoning underlying" Rules 19 and 23. Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment. The Committee stated, "[i]ntervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i)[18] on joinder of persons needed for a just adjudication." *Id.* It also stated, an applicant should be allowed "to intervene in an action when his position [was] comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest [was] already adequately represented in the action by existing parties." *Id.* Rules 19 and 24 share almost identical language because of their design to work in tandem. Nelson, 106 Va. L. Rev. at 334, 355.

Although "practical considerations" were incorporated into Rules 19 and 24, the concern at issue was the "legally protected interests of the sort that might form the basis for a lawsuit, not simply practical interests that might make someone care about the outcome of the suit." Nelson, 106 Va. L. Rev. at 334; *see also* 6 Moore's Federal Practice - Civil § 24.03 (2022) (stating "the term *protectable* means legally protectable. A movant's interest must be 'direct, substantial, and legally protectable' to satisfy the interest requirement of Rule 24(a)(2).") (emphasis in original)).

[18] This rule has since been renumbered to Rule 19(a)(1).

In 2007, however, the *San Juan* en banc panel concluded it would no longer follow the "direct, substantial, and legally protectable" standard. *See San Juan*, 503 F.3d at 1193, 1195, 1199 (stating it is not legal error to consider those factors, "[b]ut other interests may also suffice"). Instead, the Court adopted the "practical judgment" standard that "must be applied in determining whether the strength of the interest . . . justif[ies] intervention." *Id.* at 1199. Although one would be hard pressed to conclude that SUWA is a necessary party in R.S. 2477 proceedings,[19] by changing the intervention standard, the panel essentially decoupled Rule 24 from Rule 19. The panel then concluded that "SUWA's environmental concern is a legally protectable interest," and that the disposition of the R.S. 2477 claims in *San Juan* "may as a practical matter impair or impede SUWA's ability to protect that interest" based on the facts of that case. *Id.* (quotations, citation, and alteration omitted).

The panel relied upon a movement that "can be traced to the 1960s and 1970s." Nelson, 106 Va. L. Rev. at 337. "[A] trio of judges on the D.C. Circuit—David Bazelon, Harold Leventhal, and Spottswood Robinson—issued two opinions that paved the way for a broad reading" of Rule 24. *Id.* at 351. The *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967) decision is one of the opinions, *id.* at 352, and the Tenth Circuit panel relied, in part, on that decision when it altered its intervention standard. *See San Juan*, 503 F.3d at 1198.

"Chief Judge Bazelon urged courts not 'to be led astray by a myopic fixation upon "interest," but instead to interpret Rule 24(a) so as to achieve the goal of disposing of lawsuits by involving as many apparently *concerned persons* as is compatible with efficiency and due

[19] Such a finding would be contrary to every Tenth Circuit decision where the Court affirmed that SUWA had no legal right to participate in an R.S. 2477 case.

process.'" Nelson, 106 Va. L. Rev. at 355 (alteration omitted) (emphasis added) (quoting *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969), which in turn quoted the *Nuesse v. Camp* decision). The D.C. Circuit's interest-based representation allowed for a "surrogate political process" to be had "within lawsuits." *Id.* at 369. It also opened the door for the liberal intervention standard that the Tenth Circuit now follows after *San Juan*. This court understands the concerns expressed in *San Juan*. But when such concerns run contrary to the stated purpose of a rule, and the corresponding modified standard works harm to the original parties, the concerns should give way.

Although the *San Juan* decision altered the intervention standard, the reasoning the panel applied to conclude SUWA satisfied the "interest" prong was still "highly fact-specific." *San Juan*, 503 F.3d at 1199 (citation omitted). When making its finding, the panel expressly noted SUWA had brough an earlier suit, and "the litigation [in *San Juan*] proceed[ed] *directly* from SUWA's earlier advocacy of its interest." *Id.* at 1168, 1199 (emphasis added). Moreover, the panel cautioned that (1) Rule 24(a) should not be applied mechanically; (2) "courts [must] exercise judgment based on the specific circumstances of the case;" (3) "one must be careful not to paint with too broad a brush in construing Rule 24(a)(2);" (4) "[t]he law can develop only incrementally;" and (5) the panel could not "produce a rigid formula that will produce the 'correct' answer in every case." *Id.*

Although this case involves some closed roads, *Kane County (2)* does not flow directly from an underlying proceeding like the one in *San Juan*. SUWA has engaged in widespread litigation challenging land use plans and has advocated for road closures, but to generalize that litigation to the point that every R.S. 2477 case flows from SUWA's advocacy would not be in harmony with the particular application in *San Juan*. Accordingly, this case is distinguishable

from *San Juan*. Arguably, were one to apply the pronouncements from *San Juan*, there could be multiple points on which this case would be distinguished from it.

Yet, it appears the Tenth Circuit has now reached a de facto rule for R.S. 2477 cases whereunder SUWA will always satisfy the "interest" prong for intervention as of right because SUWA has a "decades-long history of advocating for the protection of these federal public lands." *Kane County (1)*, 928 F.3d at 892.[20] The de facto rule, however, does not appear to take into account that such advocacy occurred in the land use arena, which arena has no application in R.S. 2477 cases. In fact, it would be improper for this court to take into account land use issues when deciding ownership and scope under R.S. 2477 and the Quiet Title Act.

While this court finds the Tenth Circuit's decoupling of Rule 24 from Rule 19 problematic—particularly since the 1966 Advisory Committee Note is still applicable—and is concerned about the majority's conclusions about SUWA's interests, the court nevertheless assumes that SUWA has satisfied Rule 24(a)'s "interest" prong.

II. ADEQUATE REPRESENTATION OF INTERESTS

A. SUWA's Converging Interests with the United States

"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.'" *Kane County, Utah v. United States*, 597 F.3d 1129, 1133–34 (10th Cir. 2010) (quoting Fed. R. Civ. P. 24(a)(2)) (other citation omitted). SUWA contends the United States cannot adequately represent its interest

[20] The majority relied on that factor and what seems to be a factual error about what would happen to the travel surface of the roads in *Kane County (1)*. Nevertheless, because rights-of-way wider than the roads' travel surfaces are in play in every one of the R.S. 2477 Road Cases, if these factors are sufficient to establish "interest," we are then at a de facto rule.

because of a line of cases that state, "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." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001). In such situations, only a minimal burden must be met to show inadequacy of representation. *See id.* at 1254–55 (citations omitted). It is that same line of cases the majority applied in the *Intervention Ruling*. Based on those land use cases, the majority concluded the United States would be considering competing policy, economic, political, legal, and environmental factors in *Kane County (1)* on the issue of scope. *See Kane County (1)*, 928 F.3d at 893–94.

In the United States' Response to SUWA's Supplemental Brief on Intervention as of Right in this case, it stated that it "does not concede that in [*Kane County (2)*] questions of scope will involve 'policy, economic, political, legal, and environmental factors'" (collectively "the Environmental Factors"). Resp. to SUWA's Supp. Brief, at 3–4 (ECF No. 709). The United States' response is not surprising because none of those factors are in play in *Kane County (2)*.

This court is the fact finder in *Kane County (2)*. It is aware of the record and the trial testimony. Extensive post-trial briefing has been submitted. Unlike in *Kane County (1)*, no additional evidence is being taken on the issue of scope in *Kane County (2)*. Thus, the court is aware of what is now before the court. And in none of the foregoing were the Environmental Factors raised or balanced by the United States because those factors are outside of the parameters of the R.S. 2477 and the Quiet Title Act analysis. Moreover, this court has observed that the United States has chosen to defend title (i.e., ownership and scope) vigorously on every bellwether road in *Kane County (2)*.

The federal government is not always legally obligated to consider a broader spectrum of views. That obligation only arises when it is "litigating on behalf of the general public," *Utah Ass'n of Counties*, 255 F.3d at 1256, or when statutory obligations impose a duty on the government "to serve two distinct interests, which are related, but not identical." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972). The very nature of the legal analysis and evidence shows the distinction between when the United States is litigating on behalf of other and when it is representing only its interests.

When this court has reviewed land use cases, the Environmental Factors are in play. For the United States to show its actions were appropriate in the land use context, it has to show what consideration it gave to competing views on the impact of an improvement project, or a travel plan, or a land management plan, and so forth. The United States has to show how it balanced those interests and any applicable environmental evidence in such a manner that its decision was not arbitrary, capricious, or contrary to law.

In an R.S. 2477 action, however, the United States does not have to present any evidence about impact on the environment or how it balanced competing interests when defending title. It does not have to offer evidence about how it has chosen to defend title. Nor are the decisions by the United States subject to challenge as being arbitrary and capricious or contrary to law because the only interest in play is its own.

In situations where the federal government is not representing interests other than its own, then the "representation is *adequate* when the *objective* of the applicant for intervention is identical to that of one of the parties." *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996) (quotations and citations omitted) (first emphasis in original) (second

emphasis added). The same remains true even if the intervenor's "ultimate motivation" in an action is different from the original party. *Id.*

In this case, the United States is not litigating to protect the general public's rights. It is litigating to protect its own exclusive title to property. It is a landowner that does not want its property rights encumbered by a right-of-way owned by Kane County or the State. Moreover, there is no statutory provision that requires the United States to consider any other competing interests but its own in this dispute.

As this court has held already on multiple prior occasions in this case, SUWA's objectives and interests in this litigation are the same as the United States. Both seek to defeat Plaintiffs' claims to title, and if title is found in favor of Plaintiffs for any road, both seek for that right-of-way to be as narrow as possible. In this, the United States and SUWA's objectives and interests are harmonious. Although the two may have diverging views about how to oppose Plaintiffs' claims, any interests SUWA may have are still *adequately* represented by the United States.

This is true regardless of whether the court is determining who is the owner of the right-of-way or the scope of that right-of-way. The scope determination does not weigh if a road should be open or closed to vehicular travel. The past use determines the type of road. It does not weigh if it is adjoined by a wilderness study area. Those areas were taken subject to the right-of-way. It does not involve a NEPA analysis or any other environmental or cost analysis because any dedication has to have occurred prior to 1976.

Through all of this, the United States has asserted it intends to argue for the narrowest width possible if any right-of-way is established in Plaintiffs' favor, and certainly, the United States has not acted contrary to its representations. During a three-week bench trial, the United

States, through multiple attorneys, presented a strong defense to Plaintiffs' claims. In its post-trial briefing, the United States seeks dismissal of every bellwether road in this case on jurisdictional grounds, and to the extent jurisdiction is found, the United States has not conceded title to a single road. SUWA can ask for no more. Based on the parameters of how scope of title is determined and the United States' representations, the court concludes SUWA's interests are adequately protected by the very entity who owns the land and who has been involved with it for more than 150 years.

B. Changes in Presidential Administrations

The court now turns to the issue of Presidential Administrations. When SUWA went before the Tenth Circuit for the third time in *Kane County (1)* on the issue of intervention, it relied heavily on the Trump administration coming into office to argue the United States would not represent SUWA's interests adequately. As the dissent stated in the *Intervention Ruling*, at times "a shift in government policy may be enough to upset the presumption of adequate representation" in the land use context. *Kane Cnty. (1)*, 928 F.3d at 904. R.S. 2477 cases, however, span many presidential terms of office. Because of how many times a change may occur over who is in office, allowing such a change to affect when intervention may occur and when it may not will wreak further havoc on an area of law that already is problematic.

As this court stated in its September 5, 2019 ruling,

> By the time this case reaches trial, has post-trial briefing, and a written ruling, we likely will be past the 2020 elections. That is how complex this case is. Speculating about what effect the Trump administration may have during an election year, and further speculating that he will be re-elected and focus on the R.S. 2477 cases is just that—speculation.

Kane Cnty., Utah, 333 F.R.D. at 934 F. Supp. 2d at 237. That has proven to be correct.

Moreover, in the same ruling, this court noted that "Ken Salazar, who served as the United States Secretary of the Interior during the Obama administration, issued a memorandum in 2010, that clarified the United States' policy about R.S. 2477 roads." *Id.* The memorandum "stated the Secretary was working towards a pilot project to negotiate resolution of the R.S. 2477 claims in Utah."[21] *Id.* "If the United States can work towards that solution under the Obama administration, then working towards such a solution under Trump administration [was] not a sea change." *Id.*

In its Fifth Motion to Intervene in this case, SUWA also initially argued that its interests would not be adequately represented because the Trump administration had been lenient in allowing an application for a recordable disclaimer of interest ("RDI") and it had decreased the size of two national monuments in Utah. No RDI, however, was at issue in Kane County. Moreover, even though the monument sizes had changed, it did not remove the lands from federal ownership and control under the BLM land management.

Additionally, what has occurred since "President Joseph Biden was inaugurated on January 20, 2021 ("Inauguration Day")," further undermines SUWA's argument. Plaintiffs' Joint Opp'n to SUWA's Supplemental Brief, at 6 (ECF No. 708).

> On Inauguration Day, Scott de la Vega, Acting Secretary of the Interior for the Biden Administration, signed Order No. 3395, which, among other things, temporarily suspended all delegations of authority to Department Bureaus and Offices to issue any final decision with respect to R.S. 2477 claims, including recordable disclaimers of interest. *See* Order No. 3395, at Sec. 3.e. Although set to expire 60-days from its execution, its effects [were] extended indefinitely [on March 19, 2021].

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[21] Press Release, July 30, 2010 at https://www.doi.gov/news/pressreleases/Salazar-Lays-Groundwork-for-Utah-Pilot-Project-to-Resolve-Old-Road-Claims-on-Public-Land (last visited Sept. 5, 2019).

> . . . Also on Inauguration Day, President Biden ordered a sixty-day review of former President Trump's 2017 boundary changes to national monuments, which included size reductions of both Grand Staircase-Escalante and Bears Ears in Utah. *See* Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (dated January 20, 2021), at Section 3; *see also* Exec. Order No. 13990, 86 Fed. Reg. 7037 (2021). The sixty-day review leaves open a range of options for the Biden Administration, but there is a strong likelihood that both of Utah's affected national monuments will be expanded well beyond the boundaries redrawn by the Trump Administration in 2017. *See, e.g.*, Brian Maffly, *President Joe Biden's order to review Utah monuments leaves options open, but expansion all but certain*, SALT LAKE TRIBUNE (Jan. 25, 2021), available at https://www.sltrib.com/news/environment/2021/01/25/president-joe-bidens/.
>
> . . . On January 27, 2021, President Biden signed an Executive Order described by the Biden Administration as a means to "help restore balance on public lands and waters and provide a path to align the management of America's public lands and waters with our nation's climate, conservation, and clean energy goals." *See* Exec. Order No. 14008, 86 Fed. Reg. 7619 (2021). Section 208 of this Executive Order directs the U.S. Department of Interior ("DOI") to pause all new oil and gas leasing on public lands and offshore waters, concurrent with a comprehensive review of the federal oil and gas program as a whole. *See id.* at 7624. Additionally, Section 216 directs DOI to outline steps to conserve at least thirty percent each of U.S public lands and waters by the year 2030. *See id.* at 7627.

Id. at 6– 7 (cleaned up). Thus, the grounds relied on by SUWA are no longer at issue.

C. Other Relevant Point on Adequacy of Representation

The court makes one final note. To the extent SUWA is contending the United States does not represent it adequately because the United States is not turning over every rock or making every possible argument, or because it may possibly disclaim or settle a claim, the court refers SUWA to Rule 1 of the Federal Rules of Civil Procedure. Rule 1 states all of the civil rules

(including those pertaining to discovery and intervention) are to "be construed, administered, and employed by the court *and* the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1 (emphasis added). If a party has a litigation tactic that contravenes Rule 1, and one is balancing interests under the practical effects standard for intervention, that tactic should not be used to justify intervention but to halt it. To do otherwise is to ignore the very problem Rule 1 seeks to address. Based on the forgoing, the court concludes SUWA does not have a right to intervene in this case.

III. SUWA'S END GOAL

Although the court has concluded that SUWA does not have a right to intervene, SUWA's end goal warrants its own discussion. SUWA has made clear that it is not trying to intervene merely to defend the United States' title to the roads. Instead, SUWA's "focused interest in land protection" is such that it desires for "*any* right of way be *closed to vehicular traffic*," within the R.S. 2477 context. Renewed Mot. to Intervene, at 13, 16 (ECF No. 410) (emphasis added).[22] The Tenth Circuit's intervention standard requires that "practical judgment . . . be applied in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention." *San Juan*, 503 F.3d at 1199.

In light of the fact that SUWA did not come into existence until seven years after any title had to have vested in the roads at issue, and that none of the other conservation groups involved in this case opposed title vesting when any such roads were dedicated to public use, the permissive intervenors' present position to shut down every R.S. 2477 road to vehicular use shows a troubling

[22] To the extent SUWA is seeking relief differently from the United States, it lacks prudential standing to do so.

disregard for the property rights of others. Moreover, it shows that any interest they have is an after-the-fact creation.

Furthermore, SUWA's (in its collective status) desire to shut down R.S. 2477 roads disregards the impact such an action would have on rural communities. If successful, SUWA's action would have the practical effect of precluding those with physical limitations from enjoying the beauties of Kane County because they lack the stamina to hike into an area having no roads. Given such detrimental impacts, SUWA's end goal is concerning.

Ironically, one could argue that roads help keep Kane County pristine. Roads keep various forms of transportation on a designated path so that the land adjoining them may remain undisturbed by vehicular traffic. For now, though, SUWA cannot use this case to reach its end goal.

LIMITED AND DISCRETIONARY PERMISSIVE INTERVENTION

SUWA is a limited permissive intervenor in this case. Restrictions have been placed on SUWA's role to ensure manageability of the case and a fair process for the original parties. The restrictions have been detailed in different permissive intervention orders. On September 9, 2019, the court issued a Fourth Amended Permissive Intervention Order (ECF No. 550) in this case and the other R.S. 2477 road cases. For reasons discussed below, that order further limited SUWA's role in this case.

Recently, SUWA has moved in one of the other R.S. 2477 cases to lift the restrictions and return to the Third Permissive Intervention Order. *See* Mot. to Return (ECF No. 160 in Case No. 2:12-cv-452). Based on statements made in a motion and the court's ruling above, the court has reason to believe SUWA will seek for the same relief in this case and other similar R.S. 2477 road

cases. Mot. for Leave to File Mot. to Return, at 2 (ECF No. 724) ("SUWA intends to file a single omnibus motion in this case seeking to return to the Third Permissive Intervention Order in *all* R.S. 2477 cases currently operating under the Fourth Permissive Intervention Order") (emphasis added)). Accordingly, the court addresses here whether the restrictions on SUWA's role should be lifted. And similar to past decisions, this ruling will apply in all cases to which the Fourth Amended Permissive Intervention Order now applies.

I. BACKGROUND

SUWA has no claims or defenses that it can raise under R.S. 2477 or the Quiet Title Act. Any defenses it may wish to raise are defenses of the United States and not its own. Despite this fact, at a global hearing on intervention in the R.S. 2477 road cases, SUWA had "at least 18 lawyers from national and international firms," present "as well as experienced local attorneys who have been retained and [would] apply the resources necessary *to properly defend* this case." Hearing Tr., at 25 (ECF No. 93 in Case No. 2:11-cv-1045) (emphasis added). It informed the court "[w]e intend to litigate [the R.S. 2477 cases] aggressively using every resource available to us." *Id.* at 77.

While the court appreciated SUWA's candidness in that moment, it was clear SUWA had the intent to take a lead role in this litigation. A lead to which it had no right to take.[23] A lead that could well harm the original parties who do have a right to be before the court.

[23] At the time of the global hearing, the Tenth Circuit had affirmed this court's decision that SUWA could not intervene as of right in *Kane County (1)* because the United States would adequately represent its interests. *See Kane County v. United States*, 597 F.3d 1129 (10th Cir. 2010). The Tenth Circuit had also affirmed the denial of SUWA's motion to intervene as of right in another quiet title action three years before that. *See San Juan*, 503 F.3d at 1167. The court saw no substantive difference in the adequacy of representation in *Kane County (1)* and the other R.S. 2477 cases pending before the court.

When considering whether a party may permissively intervene, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Based on SUWA's representations and show of its litigation team, the court concluded, "[i]f SUWA were allowed to intervene, without *strict limitations*, . . . this case would become 'fruitlessly complex or unending,' to the prejudice of the parties." *Sevier County v. United States*, No. 2:12-cv-452, 2013 WL 2643608, at *4 (D. Utah June 12, 2013) (emphasis added) (citation omitted); *Kane County (2)* Order, at 2 (ECF No. 181) (adopting same reasoning for conditions stated in *Sevier County*).

SUWA, however, had represented at the global intervention hearing that it had access to evidence that the federal government did not have. Hearing Tr., at 25 (ECF No. 93 in Case No. 2:11-cv-1045). The court was persuaded that if SUWA did have such evidence, then it could be a backstop to the United States.[24] To ensure SUWA acted only as a backstop, and not as a lead to the detriment of the original parties, the court set specific conditions on SUWA's participation. It

[24] In relation to SUWA's Fifth Motion to Intervene, the court asked SUWA to detail what additional evidence it would have presented at trial on the issue of scope. SUWA responded that it would have presented its own aerial imagery expert. Mot. to Intervene, at 24 (ECF No. 607). SUWA admits that the United States presented such an expert who was qualified. *Id.* The United States' expert looked at aerial imagery from 1953, 1974, and 2016. *Id.* SUWA's expert, however, also looked at imagery from the 1960's, but SUWA has failed to show or explain how that altered the analysis presented by the United States about whether a road was present or not. *Id.* SUWA only asserted that its expert engaged in a nuanced analysis to show the degree that the road was present. *Id.* at 24. The court can tell the nuanced degree, however, from the evidence presented by the United States. Finally, SUWA asserts it had an expert historian who could have discussed federal regulations and their practical implementation on such things as range improvements. *Id.* at 26. To the extent such testimony would have been permissible, and not improper testimony on legal conclusions, the United States also presented testimony from an expert historian who addressed range improvement projects and other similar historical information. Thus, SUWA's evidence merely shows how well-prepared the United States was in its defense and that it vigorously pursued and presented the same type of evidence that SUWA did.

did so based on its discretionary authority and in aid of the "efficient conduct of the proceedings." *United States v. Albert Inv. Co., Inc.*, 585 F.3d 1386, 1396 (10th Cir. 2009) (quotations omitted) (citing *San Juan*, 503 F.3d at 1189; *Beauregard, Inc. v. Sword Servs., LLC*, 107 F.3d 351, 352–53 (5th Cir. 1997) ("It is now a firmly established principle that reasonable conditions may be imposed even upon one who intervenes as of right.")).

From the time the court placed limitations on SUWA's role, SUWA has bristled over the restrictions and sought to thwart them so it could take the lead and act as a full party. Its actions have hindered the resolution of these proceedings to the actual detriment of the original parties. When a *limited permissive* intervenor's rights and actions surpass that of the original parties, something is wrong, and the course needs to be corrected. The court now turns to just a few examples of SUWA's conduct in the R.S. 2477 proceedings.

I. CONDITIONS PLACED BY COURT

A. Claims and Defenses

Although this court allowed SUWA to permissively intervene, it stated, "SUWA is prohibited from asserting new claims, cross-claims, counterclaims, or *defenses* in this matter." Order, at 3 (ECF No. 181) (emphasis added). Prior to *Kane County (2)*, the court had experience with SUWA, as an amicus party, in *Kane County (1)*. In its amicus capacity, SUWA raised several statutes of limitation defenses that required a significant amount of Plaintiffs' time and the court's time to address. Ultimately, the court concluded that none of them had merit, *see Kane Cnty.,*

Utah, 934 F. Supp. 2d at 1360–64, which ruling was affirmed on appeal, 772 F.3d 1205 (10th Cir. 2014).[25]

When this court ruled on SUWA's defenses in *Kane County (1)*, it noted the following:

> [W]hen the United States initially filed its Answer [in *Kane County (1)*], it asserted a statute of limitations defense. After conducting discovery on the issue, however, the United States concluded that none of its actions was sufficient to show an adverse claim against Kane County. It therefore stipulated that the statute of limitations had not run. Given that the United States is the very entity that was involved in these matters, and not SUWA, it is in a better position to determine if the United States asserted an adverse claim against Kane County.

Kane Cnty., Utah, 934 F. Supp. 2d, at 1364 (internal citations omitted). Recognizing that (1) SUWA had not added anything meaningful in *Kane County (1)* when it raised the defenses it did, (2) the United States had exercised proper judgment in defending title and adequately protected SUWA's interests, and (3) both the parties and the court had expended unnecessary resources to address issues raised by SUWA, the court sought to avoid the same problem in the new R.S. 2477 road cases. It therefore prohibited SUWA from asserting new defenses in the R.S. 2477 road cases.

On May 30, 2014, the United States filed a Motion for Partial Dismissal, which asserted the claims in *Garfield County* were barred by Utah Code Ann. § 78B-2-201 on *statute of limitations* grounds. Mot. to Dismiss, at 58–60 (ECF No. 135 in Case No. 2:11-cv-1045). SUWA requested leave to file a memorandum in support. It acknowledged it could not raise new defenses and

[25] The Tenth Circuit's ruling addressed two memorandum decisions issued by the court. A portion of the court's rulings were reversed by the Tenth Circuit, but none of those portions involved the court's rulings pertaining to SUWA's defenses.

represented that its brief merely "expand[ed] upon certain points" the United States had already raised. Mem. re Leave to File, at 2 (ECF No. 137 in Case No. 2:11-cv-1045).

Contrary to SUWA's representations, its brief raised a new defense. It did not expand upon the United States' argument that Plaintiffs' claims were barred by a statute of limitations. Instead, it argued that § 78B-2-201 is not a statute of limitations at all, but a statute of repose. Mem. in Supp., at 21 (ECF No. 137-2) (stating "SUWA is compelled to write separately . . . because the United States fails to note" § 78B-2-201 is a statute of repose).

The State originally filed an objection to SUWA's motion. Mem. in Opp'n (ECF No. 138 in Case No. 2:11-cv-1045). Later, however, it asked for an extension to respond substantively to the defense raised by SUWA. Mot. for Extension (ECF No. 141 in Case No. 2:11-cv-1045). After the State filed its opposition to both the United States' brief and SUWA's, Mem. in Opp'n (ECF No. 147 in Case No. 2:11-cv-1045), the court granted SUWA's motion to file its supporting brief, and made it retroactive to June 27, 2014, to conform the record. Order (ECF No. 151 in Case No. 2:11-cv-1045).

The court still had the inherent authority to later strike the defense raised by SUWA. During this same time frame, however, SUWA filed a parallel state action in Tooele County seeking to enjoin the State Attorney General from litigating *all* R.S. 2477 cases based on § 78B-2-201 being a statute of repose. This placed SUWA in a lead role and multiplied and divided the proceedings.[26] One way or another, Plaintiffs would have to deal with the defense SUWA raised.

[26] This court temporarily enjoined SUWA from proceeding in the new case under the All Writs Act, 28 U.S.C. § 1651, until it could determine "whether an injunction is appropriate under [the Anti-Injunction Act], 28 U.S.C. § 2283." *See Tooele County, Utah v. United* States (ECF Nos. 89, 90 in Case No. 2:12-cv-477). SUWA appealed the matter before the court issued that analysis, and in 2016, the Tenth Circuit struck down the injunction on the ground that it did not meet the

Prior Utah cases addressing § 78B-2-201 had always applied it as a statute of limitations. Certification Order, at 7–8 (ECF No. 211); *see also* (ECF No. 169 in Case No. 2:11-cv-1045). The cases, however, had not directly addressed whether § 78B-2-201 was a statute of repose. "[I]n deference to the State's right to determine the meaning of its laws," the active judges, assigned to the R.S. 2477 road cases in this district, certified the question to the Utah Supreme Court on April 17, 2015. Certification Order, at 3, 9 (ECF No. 211).

On July 26, 2017, the Utah Supreme Court issued its ruling. It concluded that § 78B-2-201 on its face may be read as a statute of repose. But such a construction was "absurd and could not have been intended by the legislature." *Garfield Cnty.*, *v. United States*, 2017 UT 41, ¶ 1, 424 P.3d 46. Consequently, based on the absurdity doctrine, the Utah Supreme Court construed the statute as a statute of limitations. *Id.*

When the Tenth Circuit issued its en banc ruling in *San Juan County, Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007), Judge Kelly authored a concurring decision that was joined by five other judges. They expressed concern over the newly adopted "practical effect" test for intervention due to "the substantial 'practical effect' an intervenor may have on litigation." *Id.* at 1209. They noted "an intervenor in a quiet title action seeking to maintain the land's current use has every incentive to use its participation to postpone a final decision on the merits, thereby prolonging its use at the expense of the parties' need to have a final adjudication of the title." *Id.* Although the concurring judges did not "suggest that SUWA [had] engaged in delaying tactics in

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Anti-Injunction Act requirements. *Tooele Cnty., Utah v. United States*, 820 F.3d 1183, 1192 (10th Cir. 2016). This court respects that judgment. It does not negate the fact, however, that SUWA multiplied the proceedings.

[the *San Juan*] lawsuit," they noted "the potential for abuse is very real." *Id.* at 1209, n.7. Unfortunately, in the present case, those observations have proved all too true when SUWA has acted to circumvent the court's limitations on SUWA's role in this case.[27]

For over two years, Plaintiffs' time and resources were taxed as they addressed SUWA's arguments before the Utah Supreme Court, which defense was ultimately rejected because it would have "work[ed] such absurd results when applied in the R.S. 2477 cases that" the Utah Supreme Court "was required to apply [its] absurdity doctrine and reform the statutes." *Garfield Cnty.*, 2017 UT 41, ¶ 19, 424 P.3d at 57.

A two-year delay in an R.S. 2477 context means the roads at issue have indefinite road signs to guide the public and a lack of maintenance—both of which impact safety—because the parties do not know who holds title. It also means evidence is lost because the witnesses who have knowledge about a road's use pre-1976 are aging. Some are in poor health, and others have died during the pendency of this litigation. The harm arising from the delay is real, and it has occurred because SUWA thwarted the court's order and insisted on taking a dominant role.

After its statute of repose defense was struck down by the Utah Supreme Court, SUWA filed another new defense.[28] Similar to the first time, SUWA denied it did so. Hearing Tr., at 55–56 (ECF No. 430). In its most recent briefing, SUWA continues to defend its actions by stating

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[27] Judge Kelly further observed, "even SUWA's non-abusive appeals [in *San Juan*] had the 'practical effect' of delaying the resolution of [that] lawsuit for three years." *San Juan*, 503 at 1209 n.7. The effects that SUWA has had, and can have, on this case is quite real.

[28] *Compare* SUWA's Answer, at 197 (ECF No. 421) (asserting ninth affirmative defense that "Plaintiffs have failed to accept, or demonstrate acceptance, of any R.S. 2477 right-of-way claimed herein") *with* United States' Answer, at 202–03 (ECF No. 420) (asserting only eight affirmative defenses).

that it did not know that its Answer had to "track[] verbatim with the United States' Answer." Reply Mem., at 10 (ECF No. 713). SUWA's reply is disingenuous. The court never said SUWA's Answer had to track verbatim with the United States' Answer. Instead, the court's order prohibited SUWA from raising new defenses. Order, at 3 (ECF No. 181). The first eight defenses SUWA raised quoted verbatim the United States' defenses. *Compare* United States' Answer, at 202–03 (ECF No. 420) *with* SUWA's Answer, at 196–97 (ECF No. 421). But SUWA then added on a ninth defense that the United States did not raise. *Id.* The simple truth is that SUWA ignored the court's order. Such conduct confirms that SUWA intends to resist this court's efforts to control the litigation and limit SUWA to backstopping the United States as the court originally directed.

B. Discovery

As stated above, SUWA represented to the court it had unique evidence that the United States did not have. That is the premise upon which SUWA was allowed in the case. It was not that it was going to use Plaintiffs' documents to defend the United States' title, but that it had its own information. Accordingly, the court did not allow SUWA to take original party discovery.[29] *See* Order, at 2–3 (ECF No. 181) (authorizing only reasonable third-party discovery).

Then SUWA pressed to expand its limited role. After the Utah Supreme Court issued its decision, SUWA changed its focus to mounting direct attacks on Plaintiffs. It filed a motion on September 28, 2017, to lift a restriction so it could propound discovery on the Plaintiffs. Mot. for Limited Discovery, at 1 (ECF No. 346). The court denied the motion on January 8, 2018. Order, at 2 (ECF No. 357).

[29] Plaintiffs and the United States were still required to produce a copy to SUWA of any discovery they exchanged. Order, at 2 (ECF No. 181).

On May 4, 2018, SUWA sought leave to file a motion for scheduling order that again asserted the restriction needed to be lifted to "confirm SUWA's discovery rights." Mot. for Leave re Scheduling Order, at 8 (ECF No. 389). It said it had approached Plaintiffs to work out an agreement about SUWA's discovery rights, but Plaintiffs would not agree. *Id.* at 10. SUWA then argued it had "*no choice* but to approach the Court for relief." *Id.* (emphasis added). In actuality, this was just another attempt to get the court to expand its intervention order.

Nevertheless, based on SUWA's arguments and this being a bellwether case, the court issued a Bellwether Trial Scheduling Order that allowed SUWA to propound non-duplicative discovery on the parties, but only *after* SUWA obtained permission from the court. Bellwether Order, at 1 (ECF No. 406). Thus, while modifying its order, the court simultaneously placed a different restriction to ensure SUWA would not abuse that modification.

Despite the court's ruling, SUWA demanded discovery in a letter to Plaintiffs on September 14, 2018. It was six pages, single spaced, and asserted that Plaintiffs' production of discovery was lacking. Letter, at 2 (ECF No. 516-10). It further contended that SUWA may have some follow up for additional discovery in the future. *Id.* It then directed Plaintiffs to produce specific portions of the discovery no later than September 28, 2018. *Id.* at 5. SUWA did not seek leave of the court to pursue such discovery. It attempted to argue, however, that Plaintiffs were at fault for not engaging in a meaningful meet and confer with them. *See* Fourth Mot. to Intervene, at 28–29 (ECF No. 516). Moreover, it still contends that "[n]o order from the Court prohibited SUWA from corresponding with the other parties, regarding discovery or otherwise." Reply Mem., at 11 (ECF No. 713). Again, SUWA's response misses the point. Issuing a six-page, single spaced document to Plaintiffs about documents Plaintiffs were to produce to SUWA constitutes

discovery. Whether the discovery is formal or informal, it is still discovery. These end runs around the conditions set by the court are unacceptable. They show a disregard for the court's rulings, and they continue to multiply the proceedings by an intervenor who was only supposed to have a limited role.

C. Motions

The court also restricted SUWA from filing motions without leave of court. By having to ask to file a motion, the limitation was meant to reflect such motions should be infrequent and made with care. As stated above, the court intended for the original parties to lead the case, and not have their attention and the court's attention diverted by SUWA.

While SUWA dutifully filed motions for leave to file a motion most of the time, those actions merely had the appearance of compliance with the purpose behind the limitation. The court recognized it was frequently addressing motions filed by SUWA, but it failed to comprehend just how far SUWA had gone from the restrictions the court had imposed. In truth, SUWA filed about *four times* as many motions as any other party before the court imposed further restrictions on September 5, 2019.[30] In hindsight, the court recognizes how much SUWA dominated the proceedings by its motion practice, until SUWA was further limited in its role, and that the court should have stopped its filings earlier to prevent the parties from having to address the issues raised by SUWA.

[30] The court has separated out the motions for leave to file a motion from the motion itself and not double counted them. The court also excluded counting motions similar to the following type: pro hac vice motions; motions to extend time to file a brief; motions to file excess pages; and motions to vacate a hearing. The court focused on the period from April 22, 2013, when SUWA filed its first motion to intervene on this docket, to September 5, 2019, when SUWA's role was further limited.

The court notes, however, that when the court did deny a motion for leave to file a motion, SUWA ignored that denial. One of the instances occurred when SUWA sought leave on May 15, 2018, to file another motion to intervene as of right. Mot. for Leave re Mot. to Intervene (ECF No. 398). The court denied the request. Dkt. Text Order (ECF No. 402).

Despite having denied the request, during the next hearing on another matter in this case, SUWA said it had "some limited comments [it] would like to make." Hearing Tr., at 8 (ECF No. 418). SUWA then proceeded to argue about how it needed to build its defenses and needed the discovery limitations lifted. *See id.* at 8–24. It further argued how things have changed and why intervention as of right was appropriate. *Id.* at 19–24. In other words, it argued its motion to intervene, which the court had already disallowed. SUWA also asked to lodge its brief. *Id.* at 20. The court granted permission to *lodge* it, *id.* at 30, but four days after the hearing, SUWA filed its brief as a motion. *See* Motion to Intervene (ECF No. 410). Thus, even when SUWA was denied leave to file a motion, that denial only meant SUWA sought ways around it. SUWA had its motion fully heard, and it later filed its motion, rather than lodging it as the court directed.

During the same hearing, after SUWA said it had some limited comments to make, it pulled up a power point presentation and said it was skipping past many of the slides. Hearing Tr., at 9 (ECF No. 418). After making its intervention arguments, SUWA's counsel stated, "[t]ypically it is *my practice* when I present a slide to the court here to lodge that. May I have leave to file the electronic copy *of what I presented* to you." *Id.* at 30 (emphasis added). The court allowed the filing based on how the statement was presented. Thereafter, SUWA lodged a twenty-five page, one-sided, slide presentation that presents multiple arguments, including full argument on its motion to intervene. *See* Notice re Visual Presentation (ECF No. 407). The slide presentation was

not limited to the few slides presented in court. Moreover, contrary to its representations to the court during the hearing, SUWA has filed no other visual presentations in *Kane County (2)*, the *Garfield County* case, or the *Tooele County* case. In other words, SUWA's practice had been *not* to file slide presentations despite SUWA's representation to the contrary. SUWA used these tactics to affect the record. A record it only has access to because the court allowed it to intervene permissively. SUWA has abused that access through its excessive motion practice and gamesmanship.

D. Nature of Representations to the Court

During a hearing where SUWA stated its planned to put on a "vigorous" defense, SUWA said its "vigorous advocacy" is required under the "rules of professional conduct," and therefore its actions could not be "an abuse or a prejudice." *See e.g.*, Hearing Tr., at 11, 16, 18 (ECF No. 418). Being an advocate, however, does not excuse SUWA's conduct in ignoring the court's orders. It also does not excuse counsel from the care required when making representations to the court. SUWA has failed to exercise the proper care. The court uses SUWA's Fourth Motion to Intervene to illustrate this point.

SUWA said it "has largely been a mere bystander" in this litigation. Fourth Mot. to Intervene, at 2 (ECF No. 516). The above facts do not bear this out.

It also said that the "Trump administration's decision to gut the Grand Staircase-Escalante National Monument . . . rescind[ed] federal protection over all or part of twelve of the fifteen Bellwether routes at issue in this case." *Id.* at 15. This implies there is no federal protection of the routes. Yet, the routes remain on federal land under BLM management.

SUWA also represented that during a seventeen-month period,[31] when SUWA was not a permissive intervenor in this case, "Plaintiffs took a slew of depositions, none of which SUWA was permitted to participate in, and ten of which Plaintiffs now intend to use at trial." *Id.* at 18. This implies SUWA had no involvement in the depositions. That is incorrect. SUWA was permitted to attend the depositions and ask questions through the United States, which it did do.[32] *See* Mem. in Opp'n, at 5–6 and Attached Exhibits (ECF No. 523).

SUWA further represented it could not "issue its own discovery," which also is not true. Mot. to Intervene, at 18 (ECF No. 516). As long as third-party discovery was reasonable, SUWA was allowed by the court's order to issue subpoenas. Order, at 2 (ECF No. 181). Unfortunately, SUWA abused this right by consistently issuing subpoenas that were overbroad. *See e.g.*, Mem. Dec., at 5 (ECF No. 394) (quashing subpoena because "for five categories of information," SUWA sought "all documents" related to the 770 roads claimed by Kane County and the 730 roads claimed

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[31] This court has been assigned *Kane County (1)* since November 2008. It was assigned case management of *Kane County (2)* on March 13, 2013, along with the other R.S. 2477 cases. *See* Mem. Dec. (ECF No. 78). On April 17, 2013, this court allowed SUWA to attend all preservation depositions before its Motions to Intervene were addressed. Minute Entry (ECF No. 89). On May 31, 2013, this court transferred *Kane County (2)* back to the presiding judge due to a pending dispositive motion. Docket Order (ECF No. 121). At that point, SUWA's motions to intervene had not been fully briefed and because the court was no longer assigned the case, it did not address the motions to intervene. On June 17, 2014, the presiding judge referred the case back to this court for consideration of SUWA's two pending Motions to Intervene. Order (ECF No. 171). The court ruled on the motions on September 10, 2014. *See* Order (ECF No. 181). This is the seventeen-month period referenced by SUWA. The court notes that on August 29, 2015, the presiding judge recused from this case (ECF No. 252), but this court continued to address all case management issues. This case was then formally assigned to this court on January 26, 2018 (ECF No. 363).

[32] Once SUWA was admitted as a permissive intervenor, the court amended its ruling so SUWA could ask questions directly, but subject to time limitations. Order, at 3 (ECF No. 181); *see also* Second Amended Permissive Intervention Order, at 3 (ECF No. 184).

by Garfield County, even though this case is only focused on 15 roads presently to ensure proper management and avoidance of undue burdens).

SUWA also said it could not assert a new defense without obtaining permission. Mot. to Intervene, at 18 (ECF No. 516). That is incorrect. SUWA is prohibited from asserting new defenses—period. Order, at 3 (ECF No. 181). There is no provision in the court's intervention order allowing for leave on this subject,[33] but SUWA has ignored that limitation.

SUWA also asserted the preservation depositions were one-sided, with only the Plaintiffs taking them. *See* Mot. to Intervene, at 19–20 (ECF No. 516). Yet, the intervention order allowed SUWA to seek leave to depose witnesses not listed by Plaintiffs. Order, at 2 (ECF No. 181).

All of these representations were made in one document. The court does not believe it necessary or useful to detail all of the other instances when SUWA has misrepresented a proceeding, or acted contrary to a court order, but they exist not only in the record of this case, but in the other R.S. 2477 cases this court is assigned and/or managing. Such conduct is not appropriate for any party, much less a party that is a limited permissive intervenor.

On September 5, 2019, the court ruled on SUWA's fourth motion to intervene, and further limited SUWA's role as a permissive intervenor for case management purposes, including to

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[33] *See* original Memorandum Decision on Intervention, *Sevier County v. United States*, No. 2:12-cv-452, 2013 WL 2643608, at *5 (D. Utah June 12, 2013) (stating "SUWA is prohibited from asserting new . . . defenses in the Road Cases," and that when making "an argument not made by the United States," that argument "shall be limited in scope to the existing claims or defenses in the case"); *see also* Modified Order re Permissive Intervention, at 4 (ECF No. 124 in Case No. 2:11-cv-1045 and Modified Order, at 4 (ECF No. 91 in Case No. 2:12-cv-452) (stating the same); Second Amended Permissive Intervention Order, at 3–4 (ECF No. 184) (same); Third Amended Permissive Intervention Order, 3 (ECF No. 405) (same); Fourth Amended Permissive Intervention Order, at 3 (ECF No. 550) (same).

ensure manageability of the case and to avoid further delays. *See* Mem. Dec., at 37 (ECF No. 549); Fourth Amended Permissive Intervention Order, at 2 (ECF No. 550). It also limited SUWA's role to help ensure a fair process for the parties, thereby avoiding further harm them. *See* Mem. Dec., at 37.

The additional limitations imposed on September 5, 2019, have proven helpful with case management and did shift the case back to focusing on the original parties. Unfortunately, the court's detailed warning in the September 5, 2019 decision has not had an impact on SUWA's continued pattern of mischaracterizing information to gain an advantage or its sharp litigation practices as discussed next.

II. SUWA'S CONTINUED CONDUCT

A. Overreaching

Based on the *Intervention Ruling*, pertaining solely to the issue of scope and not ownership, SUWA now contends the *Intervention Ruling* necessarily applies to ownership, so SUWA must be allowed to intervene on all issues in *Kane County (2)*. The court agrees with Kane County that such overreaching has "become a standard practice" of SUWA. County's Mem. in Opp'n to Intervention Mot., at 21 (ECF No. 649). Such conduct continues to multiply the proceedings.

B. Representations about Width

SUWA also continues to misstate the width issue. After Plaintiffs expressly stated they do not plan to increase the width of the roads in this case, SUWA asserted Plaintiffs' representation was "especially bizarre." Reply Mem., at 5 (ECF No. 654). SUWA represented that "Plaintiffs from the outset of [*Kane County (2)*] have in fact been asking this Court to permit them to open every closed bellwether route and expand every bellwether route into a highway of at least 66

feet." *Id.* SUWA cited the County's Amended Complaint in this case to support SUWA's representation. *Id.* at 5 n.16. SUWA's representation has a partial truth to give it credibility, but SUWA coupled it with an exaggeration or mischaracterization to obtain SUWA's desired outcome. As the court stated above, however, there is a difference between the travel surface width and the non-travel surface width. To the extent SUWA is implying this litigation is meant to change the travel surface of every bellwether route to 66 feet, that is not accurate.[34]

C. May 19, 2022 Representations

Another event also discloses that, despite the court's September 5, 2019 admonition, SUWA still is not being candid with the court and appears to be engaged in further gamesmanship. The court held a Status Conference on May 19, 2022 in *Kane County (1)*. "SUWA informed the court that preservation depositions were going to resume on June 6, 2022 in another case." Dkt. Text Order (ECF No. 725 in Case No. 2:10-cv-1073). SUWA asked for the court to revoke the Fourth Amended Permissive Intervention Order and reinstate the Third Permissive Intervention Order on the reported ground that it would allow SUWA to participate more fully at the upcoming depositions. "SUWA represented to the court that it did not consult with counsel for Kane County [about the issue] because they were not going to be involved in the depositions." *Id.*

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[34] On its website, SUWA has engaged in the same types of characterizations. State's Opp'n to Returning to the Third Amended Permissive Intervention Order, at 5 (ECF No. 162 in Case No. 2:12-cv-452). "In an entry . . . entitled 'Hoax Highways,' SUWA represents to the public" that "the overwhelming majority" of the roads "'are wash bottoms, cow paths, and two-tracks in the desert, which the state and counties seek to improve (by paving, for example) and widen up to sixty-six feet—about as wide as ten passenger cars.'"
Id. (quoting https://suwa.org/issues/phantom-roads-r-s-2477/). The court will discuss more about the *Sevier County* case in the next section.

Because the Third and Fourth Permissive Intervention Orders are "not applicable in *Kane County (1)*, and the County in which depositions [were] to be taken need[ed] notice about SUWA's motion, the court instructed SUWA to file a Motion for Leave to File in the appropriate case. SUWA stated it would do so." *Id.* SUWA, however, did not do what it said it would do. "Instead, SUWA filed its motion in this case, which is *Kane County (2) vs. United States*." *Id.*

To reiterate, SUWA informed the court that it did not consult with Kane County about its proposal because Kane County would "not be involved in the June 6, 2022 depositions." Yet, SUWA filed the motion in the *Kane County (2)* case and did not provide notice to the relevant county about its intentions. In the motion for leave to file the motion, SUWA represented that it intended "to file a single omnibus motion in [*Kane County (2)*] seeking to return to the Third Permissive Intervention Order in *all* R.S. 2477 cases" then subject to the Fourth Permissive Intervention Order, unless directed to file its motion in all such cases. Mot. for Leave, at 2 (ECF No. 724 in Case No. 2:10-cv-1073) (emphasis added). The application to "all" also went beyond the scope stated at the May 19, 2022 hearing. Moreover, rather than depriving one county of notice, SUWA's motion would have denied all relevant counties of notice had it been permitted to file a single omnibus motion in *Kane County (2)*.

This recent chain of events is indicative of how SUWA has litigated in these road cases. Whenever it is afforded any leeway, problems arise. And SUWA continues to disregard the rights of others in pursuit of its own interests.

D. Bull Valley Gorge

In its Fifth Motion to Intervene, SUWA references the *Bull Valley Gorge* case[35] to support that SUWA should be allowed to intervene as of right in this case. The *Bull Valley Gorge* case does not support that proposition and is another example of how SUWA's ignores the rights of others.

Bull Valley Gorge is a narrow slot canyon that intersects the Skutumpah road in Kane County. The underlying facts of the *Bull Valley Gorge* case pertained to whether a bridge that crosses the canyon exceeded the scope of the Skutumpah right-of-way and required BLM consultation. Skutumpah is an adjudicated R.S. 2477 right-of-way, but its scope has not been determined yet. That issue is before the court in *Kane County (1)*.

Even though none of the facts relating to the bridge or Skutumpah are at issue in this case, SUWA argued in its motion that the United States could not defend itself in the *Bull Valley Gorge* case, and still adequately represent SUWA's interests in this one. Reply Brief, at 7–8 (ECF No. 713). Due to the narrow scope of the *Bull Valley Gorge* case, and that Skutumpah is not at issue in this case, the court disagrees *Bull Valley Gorge* precluded the United States from adequately representing SUWA in this case. That said, SUWA has since dismissed the *Bull Valley Gorge* case voluntarily, *see* (ECF No. 53 in Case No. 2:20-cv-539), so any asserted tension is no longer at issue. SUWA's actions in the *Bull Valley Gorge* case, however, are relevant here. Accordingly, the court now turns to them.

[35] The case name for the Bull Valley Gorge case is *Southern Utah Wilderness Alliance v. United States Bureau of Land Management*, No. 2:20-cv-539 (D. Utah).

Tragically, "[i]n 1954, a truck went over the [Bull Valley Gorge] bridge and became tightly wedged in the slot canyon. Earthen materials were filled in over the truck to rebuild the bridge after the accident." Mem. Dec., at 2 (ECF No. 356 in Case No. 2:08-cv-315). Other repairs occurred over the years. Then in or about March 2019, either a flash flood washed the bridge away or the bridge collapsed taking "away approximately eighty percent of the bridge." *Id.* "[T]hat stretch of Skutumpah had to be closed." *Id.* This was a problem because "Skutumpah has served as an important road between two communities for many years." *Id.*

After "submitting plans to the BLM" about how it intended to replace the bridge, Kane County installed a reengineered bridge in 2020.[36] *Id.* SUWA then sued the BLM in the *Bull Valley Gorge* case "on the bases that the BLM had misclassified the nature of the project and [had] failed to conduct a necessary analysis under the National Environmental Policy Act ("NEPA").[37] *Id.* Notably, however, SUWA did not name Kane County as a party even though (1) the County has an adjudicated R.S. 2477 right-of-way for Skutumpah, (2) the bridge at issue is Kane County's property,[38] and (3) an underlying issue pertained to whether the bridge fell within the scope of Kane County's right-of-way for Skutumpah.

As the court stated above, SUWA refuses to recognize the rights of others when it disagrees with those rights. Even though the County now has an adjudicated right-of-way for the Skutumpah

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[36] The County did not disturb the truck that is lodged in the slot canyon and formed the basis for the prior bridge. Amended Mot. to Intervene, at 8 (ECF No. 49 in Case No. 2:20-cv-539).

[37] The court does not express an opinion about whether the bridge replacement constituted maintenance or an improvement.

[38] Kane County requisitioned and paid for the bridge. Amended Mot. to Intervene, at 2–3, 14 (ECF No. 49 in Case No. 2:20-cv-539).

road, SUWA excluded the County as a participant when it filed suit, potentially to the County's harm.

Before the County attempted to intervene to defend its rights, another judge in this district entered a decision in the *Bull Valley Gorge* case that has far reaching implications if it is followed in other cases.[39] *See S. Utah Wilderness All. v. United States Bureau of Land Mgmt.*, 551 F. Supp. 3d 1226 (D. Utah 2021) (hereinafter the "*Bull Valley* decision").

In 2005, the Tenth Circuit issued *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005) (hereinafter the "2005 Case"). The Tenth Court grappled with the parameters of an R.S. 2477 right-of-way and what rights were attendant to title. *Id.* at 741–42. It recognized too loose or too tight of an interpretation could have unintended effects. *Id.* at 742. One of the rights that was before the Court was whether a county had to consult with the BLM before it did work on a right-of-way. Road crews from three counties had graded sixteen roads located on federal lands without notifying the BLM. *Id.* The counties asserted their R.S. 2477 rights allowed them to engage in such activities, but SUWA filed suit and asserted the counties' actions violated FLPMA, NEPA, and the Antiquities Act, 16 U.S.C. § 431. *Id.* at 742–43. Thus, the issue before the Tenth Circuit pertained to the statutory interpretation of R.S. 2477.

"R.S. 2477 is a federal statue and it governs the disposition of rights to federal property, a power constitutionally vested in Congress." *Id.* at 762 (citations omitted). Additionally, "[t]he construction of grants by the United States is a federal not a state question." *Id.* (quotations and

[39] Shortly after the decision issued, the *Bull Valley Gorge* case was transferred to this court because it became intertwined with the scope issue that remains in *Kane County (1)* for Skutumpah. Mem. Dec., 5–6 (ECF No. 356 in Case No. 2:08-cv-315).

citations omitted). Nevertheless, "it is not uncommon for courts to 'borrow' state law *to aid in interpretation of federal statute*." *Id.* (emphasis added).

Accordingly, in the 2005 Case, the Tenth Circuit applied these principles and borrowed certain portions of common law to establish the parameters of R.S. 2477 rights because "when Congress granted rights of way" under R.S. 2477, it was aware of and incorporated the common law pertaining to the nature of public highways and how they are established." *Id.* at 763–64. In other words, the R.S. 2477 statutory rights are based on principles of common law, but the rights still remain statutory because they were incorporated therein. Accordingly, the Court's discussion of common law must be read in that context. The discussion separated out "maintenance" from "improvements" as the boundary for R.S. 2477 rights. *Id.* at 748–49.

In the *Bull Valley Gorge* decision, however, the Court stated that the consultation obligation arising from the maintenance versus improvement differentiation was only a matter of common law. *Bull Valley Gorge*, 551 F. Supp. 3d at 1240–41. Because the Administrative Procedures Act does not permit review of common law matters, the court concluded the APA was inapplicable in the *Bull Valley Gorge* decision. *Id.* at 1242. The court then set a new standard for how or when the BLM must act when a county proposes a project and reversed the BLM's final agency action under that standard.[40] *Id.* at 1244. The *Bull Valley Gorge* decision arguably reached an erroneous legal conclusion and has the potential to impact Kane County negatively on future projects.

[40] After reversing the BLM, the Court set the matter for further briefing. *Bull Valley Gorge*, 551 F. Supp. 3d at 1244. For reasons stated below, however, the *Bull Valley Gorge* decision ultimately was never implemented in that case and had no effect on the bridge.

Counsel for Kane County is the same counsel who appeared before the Tenth Circuit in the 2005 Case. It knows what issue was before that Court. It also knows best what actions it took relative to the Bull Valley Gorge bridge. Had SUWA not excluded the County when it filed suit, the County's viewpoints could have been heard before the *Bull Valley Gorge* decision issued. Shortly after Kane County moved to intervene, however, SUWA voluntarily dismissed the *Bull Valley* case with prejudice. *Compare* Mot. to Intervene (ECF No. 36 in Case. No. 2:20-cv-539) (filed on Sept. 8, 2021) *with* Stipulation of Dismissal (ECF No. 53 in Case No. 2:20-cv-539) (filed on Oct. 27, 2021).

Essentially, SUWA "will do whatever it wants to do." Kane Cnty.'s Memo. in Opp'n, at 23 (ECF No. 649 in Case No. 2:10-cv-1073). Accordingly, the court concludes the limitations placed on SUWA's role are still necessary to facilitate case management and ensure a fair process for the original parties. The Fourth Amended Permissive Intervention Order shall therefore remain in place in all cases to which it presently applies.

CONCLUSION

For the reasons stated above, the court DENIES SUWA's motion to intervene as of right (ECF No. 607) in *Kane County (2)*. The Fourth Amended Permissive Intervention Order shall remain in place in all cases to which it presently applies. In the event there is any question, the court informs SUWA that if it wishes to appeal this decision, the Fourth Amended Permissive Intervention Order does not preclude SUWA from filing the requisite Notice of Interlocutory Appeal.

DATED this 6th day of June, 2022.

BY THE COURT:

Clark Waddoups
United States District Judge