Appeal No. 22-4087

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KANE COUNTY, UTAH, et al.,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA,
Defendants-Appellees,
and
SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,
Defendants-Intervenors-Appellants.

On Interlocutory Appeal from the United States District Court
for the District of Utah
The Honorable Clark Waddoups
District Court Case No. 2:10-cv-1073

OPENING BRIEF FOR APPELLANTS SOUTHERN UTAH WILDERNESS ALLIANCE, et al.

ORAL ARGUMENT REQUESTED

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GLOSSARY

BLM	Bureau of Land Management
GIS	Geographic Information System
R.S. 2477	Revised Statute 2477

CASE NAME ABBREVIATIONS

Kane I Intervention	*Kane Cnty., v. United States*, 928 F.3d 877 (10th Cir. 2019)
Kane I	*Kane Cnty., v. United States*, Case No. 2:08-cv-315 (D. Utah 2008)
Kane Cnty. 2022	*Kane Cnty., (2), (3), (4) v. United States*, Consol. Case No. 2:10-cv-1073, 2022 WL 1978748 (D. Utah) (June 6, 2022)

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1(a), Southern Utah Wilderness Alliance, The Wilderness Society, Sierra Club, and Grand Canyon Trust (collectively "SUWA"), through their undersigned counsel, hereby disclose that they have no parent corporations, nor does any publicly held corporation own 10% or more of their stock.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 2409a and § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF RELATED CASES

Under Tenth Circuit Rule 28.2(C)(3), SUWA identifies the following related appeals: *In re: Southern Utah Wilderness Alliance, et al.*, No. 19-4134 (10th Cir. 2019); *Kane County v. United States*, No. 18-4122, 928 F.3d 877 (10th Cir. 2019), *reh'g en banc denied* 950 F.3d 1323 (10th Cir. 2020), *cert. denied* 141 S. Ct. 1283, 1284 (2021).

STATEMENT OF ISSUES

In 2019, this Court ruled in *Kane County v. United States* ("*Kane I Intervention*"), 928 F.3d 877 (10th Cir. 2019) that SUWA has an interest that may be impaired, that the United States (the existing defendant) may not adequately represent SUWA's interest, and that SUWA was therefore entitled to intervene as of right in a Quiet Title Act case involving the scope of three rights-of-way in Kane County, Utah. This case involves the same legal claims and issues, the same parties, and the same county, but different routes. Moreover, *Kane I Intervention* addressed SUWA's right to intervene as to the scope of the rights-of way. However, this Court's analyses and conclusions in that case compel the same conclusion as to SUWA's right to intervene as to the determination of who holds title to those rights-of way. The question before this Court is whether the district court erred in denying SUWA's motion to intervene as of right in this case, as to both scope and title.

INTRODUCTION

In *Kane I Intervention*, this Court ruled that SUWA was entitled to intervene as of right in *Kane I* as to the scope of the rights-of-way involved.[1] *Kane I* is one of dozens of nearly identical Quiet Title Act cases, including the instant case, brought by Utah and its counties involving rights-of-way crossing federal public lands in Utah, many of which traverse environmentally sensitive areas in or near wilderness caliber areas. This appeal arises from the district court's decision not to abide by *Kane I Intervention* in this case ("*Kane II"*), despite the fact that this case involves the same parties, the same legal issues and the same interests as in *Kane I*. Indeed, the only difference between the matters is that they involve different claimed rights-of-way, though they are all, also, within Kane County.

Like in *Kane I*, in this case, plaintiffs are proceeding under the Quiet Title Act and claiming rights-of-way pursuant to Revised Statute ("R.S.") 2477, a now-repealed federal law which granted rights-of-way over unreserved federal land for the construction of highways in the West.[2] Many of the routes now claimed are

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[1] *Kane I Intervention*, 928 F.3d at 882; *Kane Cnty., v. United States* ("*Kane I*"), Case No. 2:08-cv-315 (D. Utah 2008).

[2] *See San Juan Cnty., v. United States*, 503 F.3d 1163, 1168 (10th Cir. 2007) (en banc) (opinion of Hartz, J.); *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 740-42 (10th Cir. 2005).

in reality dirt paths or stream bottoms passing through unspoiled wilderness—including routes that are presently closed to public motorized traffic by the United States. The State and Counties wish to open those routes to vehicular traffic. This encroachment of vehicle traffic into some of the nation's wildest public lands is antithetical to SUWA's core mission. As such, from the outset of this and other R.S. 2477 cases SUWA has sought to intervene as of right to hold plaintiffs to their burden and minimize, as much as possible, state and county control (and therefore maximize public land protection) over claimed routes that affect SUWA's interests, and to minimize the scope of those routes if plaintiffs ultimately obtain title. This Court, in *Kane I Intervention*, recently reaffirmed its longstanding conclusion that SUWA's interest is a legally protectable interest for purposes of intervention and concluded that the United States may not adequately represent that interest. As a result, this Court concluded SUWA was entitled to intervene as of right to protect its interests.

Despite the fact that this Court's decision is binding on district courts in the Circuit, the district court in this case chose not to abide by it. Instead, the district court judge made clear that he disagreed with this Court's conclusions in *Kane I Intervention*, opining that the Court's ruling was "perplexing," "problematic," and

something with which he simply "disagree[d]."[3] He made equally clear that he disagreed that SUWA has any protectable interest, describing the very interest this Court recognized as "indisputable" nearly 15 years ago (sitting *en banc*) and again in *Kane I Intervention* as "concerning" and an "after-the-fact creation."[4] And in an apparent prejudgment of the case, the district court judge opined that SUWA's attempt to defend its interest in these cases "showed a troubling disregard for the property rights of others,"[5] despite the fact that no determination has yet been made about whether Plaintiffs have proved that they have any such rights.

In reaching those conclusions and denying SUWA's motion to intervene, the district court simply ignored the binding nature of this Court's decision in *Kane I Intervention* on the issues before it. Disagreement with this Circuit or with SUWA's mission is not, of course, a basis to disregard binding precedent. This Court should reverse the district court, reaffirm that its *Kane I Intervention* decision is in fact binding, and direct that SUWA be granted intervention as of right.

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[3] *Kane Cnty. (2), (3), (4) v. United States* ("*Kane Cnty. 2022*"), Consol. Case No. 2:10-cv-1073, 2022 WL 1978748, at *4, *12 (D. Utah) (June 6, 2022).
[4] *Id.* at *15.
[5] *Id.*

STATEMENT OF THE CASE

R.S. 2477 is an 1866 statute that encouraged development and construction of highways throughout the west by granting certain rights-of-way over federal public land.[6] In October 1976, the statute was repealed by the Federal Land Policy and Management Act ("FLPMA"), representing a policy shift from development to retention and conservation of public lands.[7] Rights-of-way in existence at the time of repeal, however, were preserved.[8]

To establish the existence of an R.S. 2477 right-of-way over public lands a plaintiff must bring a claim under the Quiet Title Act, 28 U.S.C. § 2409a, and prove that, as of October 1976, (1) the claimed routes had been "constructed;" (2) the routes were "highways;" and (3) the underlying land had not been reserved for public use.[9] If the plaintiff proves the existence of a right-of-way (the "title" determination), the court determines the width of the right-of-way based on its historic uses (the "scope" determination).[10]

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[6] *Kane I Intervention*, 928 F.3d at 882.
[7] *Id.*
[8] *Id.*
[9] *See* 43 U.S.C. § 932 (repealed 1976); *see also, e.g., S. Utah Wilderness All.,* 425 F.3d at 778, 782; *San Juan Cnty., v. United States*, 754 F.3d 787, 797 (10th Cir. 2014).
[10] *See Kane I Intervention*, 928 F.3d at 882.

In 2004, nearly thirty years after the passage of FLPMA and repeal of R.S. 2477, San Juan County, Utah brought one of the first of many cases in Utah seeking to quiet title to historic alleged rights-of-way.[11] In April 2008, Kane County and the State of Utah (the same plaintiffs as in this case) brought the first of several cases collectively seeking to establish rights-of-way to hundreds of routes in Kane County.[12] The initial case (*Kane I*) sought to quiet title to fifteen alleged R.S. 2477 rights-of-way. This case (*Kane II*) alleges hundreds of additional rights-of-way in Kane County.[13] Collectively, the pending R.S. 2477 lawsuits involve approximately 12,000 rights-of-way in various counties throughout Utah.

Given the immense impact that some of these claims stand to have on SUWA's interests, SUWA moved to intervene early in these cases. SUWA raised the issue of intervention with this Court first in 2004 (in *San Juan County*) and then again in 2009 (in *Kane I*). In both cases, the Court considered only SUWA's interest in the title determination (i.e., whether the County and State had acquired title to the right-of-way as of October 1976 or whether instead, the United States retained title). Each

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[11] *San Juan Cnty.,* 503 F.3d at 1170.
[12] *Kane Cnty., v. United States*, 772 F.3d 1205 (10th Cir. 2014).
[13] The State of Utah became a Plaintiff Intervenor in 2011. App. I-13 (Dkt. 54 Order Granting State of Utah's Motion to Intervene). Several cases were subsequently consolidated for case management purposes after additional cases were filed by Kane County and the State of Utah between 2010 and 2012. App. I-15-16 (Dkt. Nos. 77, 89, 91 resolving Motion to Consolidate).

time, the Court held that while SUWA undoubtedly had an interest in the litigation, the United States adequately represented SUWA's interests and affirmed the denial of intervention as of right.[14] Focusing solely on the title determination, the Court reasoned that the United States "had only a single litigation objective — namely, defending exclusive title to the road — and SUWA could have had no other objective regarding the quiet-title claim."[15]

Following the trial and partial reversal of *Kane I*, in 2018, SUWA again moved for intervention as of right. The district court again denied SUWA's motion, which SUWA then appealed to this Court. Considering whether the United States adequately represented SUWA's interests in the *scope* of rights-of-way for the first time,[16] this Court held that SUWA was entitled to intervene as of right (in *Kane I Intervention*).[17]

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[14] *San Juan Cnty.*, 503 F.3d at 1206; *Kane Cnty., v. United States*, 597 F.3d 1129, 1135 (10th Cir. 2010).

[15] *San Juan Cnty.*, 503 F.3d at 1206; *Kane Cnty.,* 597 F.3d at 1135 (considering only SUWA's interest in the title determination, finding that any interest that SUWA held in the scope determination had been waived for purposes of the appeal).

[16] Although title of the rights-of-way were not at issue in *Kane I Intervention*, the court explained that while "SUWA and the United States [have] identical interests in the title determination," that results only in a presumption of adequate representation, which may be rebutted. 928 F.3d at 894.

[17] *Id.* at 890.

As to adequacy of representation, this Court concluded that SUWA's and the United States' interests were not identical, and, even if they were, SUWA overcame any presumption of adequacy.[18] The Court found that SUWA's goal was to "limit as much as possible the number of vehicles on the road," whereas the United States' "objective[s] involve a much broader range of interests, including competing policy, economic, political, legal and environmental factors," the "public interest," as well as its internal interest in "the efficient administration of its own litigation resources."[19] The Court concluded that, "given [this Circuit's] 'relaxed' intervention requirements in 'cases raising significant public interests' such as this one, and our 'liberal approach to intervention,' . . . SUWA has satisfied its 'minimal' burden of showing that the United States may not adequately represent its interests."[20]

Following *Kane I Intervention*, SUWA promptly moved the district court to implement that decision and grant intervention as of right in this case, where SUWA had previously been granted permissive intervenor status (with significant restrictions). At that point, this case was approaching trial on fifteen bellwether

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[18] *Id.* at 894-95.
[19] *Id.* at 894-95.
[20] *Id.* at 896-97 (citing *San Juan Cnty.*, 503 F.3d at 1201 and *W. Energy All. v. Zinke* ("*Zinke*"), 877 F.3d 1157, 1164 (10th Cir. 2017)).

claims, and all of the parties collectively agreed (in light of *Kane I Intervention*) that SUWA should "fully participate as an intervenor at [the upcoming bellwether] trial."[21] The district court disagreed. The district court suggested (despite this Court's decision to the contrary) that SUWA needed but did not have Article III standing, and held that the United States adequately represented any limited interests SUWA might have.[22] The district court justified its refusal to abide by this Court's decision by reasoning that it was not obligated to follow the decision until the mandate issued (it had not, in light of pending *en banc* petitions).[23] At the same time, the district court severely limited SUWA's future participation in the Bellwether case as well as the full suite of R.S. 2477 cases throughout Utah.[24]

SUWA thereafter filed a Petition for Writ of Mandamus asking this Court to direct the district court to abide by the published *Kane I Intervention* decision, notwithstanding that the mandate had not formally issued, explaining that under this Court's rules and precedent the decision was already binding on the district court, and that SUWA would be prejudiced by being excluded from the upcoming

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[21] App. VI-1755 (Joint Email to the District Court).
[22] *Kane Cnty., (2), (3), & (4) v. United States*, 333 F.R.D. 225, 234–38, 245 (D. Utah 2019).
[23] *Id.* at 244.
[24] *Id.* at 239-45.

bellwether trial.[25] This Court denied the petition, reasoning that, while the district court may have "erred as a matter of law in holding that [it] is not bound, pre-mandate, to apply *Kane I [Intervention]* in the other pending R.S. 2477 cases," that error was not sufficiently "egregious" to constitute the "gross abuse of discretion" necessary to warrant "a writ of mandamus."[26] And the Court noted that the district court had indicated that "[w]hen the mandate . . . ultimately issues, [it] will respect that ruling."[27]

However, when the mandate ultimately issued, the district court did not implement that ruling. Following issuance of the mandate on March 6, 2020 (after petitions for rehearing *en banc* had been denied), SUWA again filed a motion to intervene.[28] The district court let that motion remain undecided on its docket for another *two years* (nearly three years after SUWA's original motion asking the court to implement *Kane I Intervention*). When the district court finally ruled, it maintained its prior position—contrary to *Kane I Intervention*—that SUWA was not entitled to intervene as of right in *Kane II*.[29]

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[25] *See* App. IV-1183-90 (Order Denying Petition for Mandamus).
[26] *Id*. at 1185-86, 1889.
[27] *Id*.
[28] App. VII-1922 (Motion for Leave to File); VII-1936 (Order Granting Leave to File); VII-1940 (Motion to Intervene as of Right).
[29] *Kane Cnty. 2022*, 2022 WL 1978748, at *2.

The district court's belated decision first criticized this Court's holding in *Kane I Intervention* with respect to standing, finding "perplexing" the Circuit's conclusions on imminent injury, but nonetheless conceding that SUWA had satisfied Article III standing.[30] Next, the district court addressed this Court's holding with respect to the "interest" prong for intervention as of right, finding the Circuit's reasoning "problematic" and its conclusions "concern[ing]," but ultimately "assum[ing] that SUWA ha[d] satisfied Rule 24(a)'s 'interest' prong."[31]

As to whether SUWA's interests on scope were adequately represented by the United States, the district court rejected this Court's conclusion in *Kane I Intervention* that "SUWA's and the United States' interests are not identical," concluding instead that "SUWA's objectives and interests in this litigation are the same as the United States."[32] Indeed, though this Court held in *Kane I Intervention* that the United States is tasked with "protecting the [] interest of the public," the district court instead concluded that "the United States is not litigating to protect the

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[30] *Id.* at *5.
[31] *Id.* at *12.
[32] *Compare* 928 F.3d at 895 ("SUWA's and the United States' interest are not identical") *with Kane Cnty. 2022*, 2022 WL 1978748, at *13 ("SUWA's objectives and interests in this litigation are the same as the United States."). As discussed, *Kane I Intervention* addressed intervention only as to scope. In the motion before the district court, SUWA sought intervention as to both scope and title, arguing that *Kane I Intervention*'s reasoning applied equally to both.

general public's rights."[33] And though this Court concluded that "the United States' objectives involve a much broader range of interests [than SUWA's], including competing policy, economic, political, legal, and environmental factors," the district court declined to abide by that conclusion as well, instead declaring that "policy, economic, legal, and environmental factors . . . are [not] in play."[34] Moreover, while this Court found relevant the United States' interest in "the efficient administration of its own litigation resources,"[35] the district court declined to consider that as a relevant factor. And in denying SUWA's motion to intervene, the district court judge made clear that he personally disagreed with SUWA's interests, describing these interests as "concerning," an "after-the-fact creation," and "show[ing] a troubling disregard for the property rights of others."[36] This appeal followed.

SUMMARY OF THE ARGUMENT

In *Kane I Intervention*, this Court held that SUWA was entitled to

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[33] *Compare* 928 F.3d at 894 ("when that property is public land, public interests are involved.") (citation omitted) *with Kane Cnty. 2022*, 2022 WL 1978748, at *13 ("the United States is not litigating to protect the general public's rights. It is litigating to protect its own exclusive title to property.").

[34] *Compare Kane I Intervention*, 928 F.3d at 894 ("the United States' objectives 'involve a much broader range of interests, including competing policy, economic, political, legal, and environmental factors.'") *with Kane Cnty. 2022*, 2022 WL 1978748, at *12 (policy, economic, political, legal, and environmental factors "are [not] in play").

[35] *Kane I Intervention*, 928 F.3d at 895.

[36] *Kane Cnty. 2022*, 2022 WL 1978748, at *15.

intervene as of right, at least as to the scope of the rights-of-way at issue in that case, because it had legally protectable interests that were not adequately represented by the United States. This case is identical to *Kane I* in all material respects, and, thus, the same conclusion follows here.

As to scope, this Court has already concluded that the United States may not adequately represent SUWA's interests due to its obligation to represent a wider range of interests, its unique administrative interests in the management of its litigation resources, and the fact that the administration directing the United States' policy may change. This nearly identical case involves these exact concerns. Because *Kane I Intervention* is binding on the district courts in this Circuit, the district court should be reversed as to scope.

As to title, the district court should be reversed, for *Kane I Intervention's* conclusions in the context of scope apply equally to the question of title. While SUWA and the United States both seek to have title in the subject roads reside with the United States, any presumption of adequate representation that results is rebutted by the fact that the United States has, by its own admission, "internal interests, such as the efficient administration of its own litigation resources … that SUWA certainly doesn't share."[37] Moreover, we now know that the United

[37] *Kane I Intervention*, 928 F.3d at 895.

States has declined in *Kane II* to assert certain dispositive defenses or arguments, urged by SUWA, not because they lack merit, but because of the potential ramification for ancillary litigation involving the United States and other administrative concerns. The inability of the United States to adequately represent SUWA's interests could not be starker. Further, the fact that these cases span multiple administrations, some of which are more inclined to settle in ways that may negatively affect SUWA's interests, underscores the possibility of inadequate representation as to title. Finally, because the evidence regarding title and scope of alleged rights-of-way is co-mingled, there is no practical way to give effect to *Kane I Intervention* while denying SUWA intervention on title.

ARGUMENT

The district court denied intervention in this case on the basis that it is "distinguishable" from *Kane I Intervention*, where this Court ruled SUWA is entitled to intervene as of right. As explained below, however, the district court's analysis makes clear that it declined to apply *Kane I Intervention* not because of any material distinctions between these parallel cases, but rather because the district court simply disagrees with this Court's decision. The district court's disagreement with this Court is not a valid basis to deny intervention.

I. Standing principles pose no bar to SUWA's intervention.

This Court has made clear that SUWA need not show standing to intervene, and that, even if it must do so, it has made the required showing. Nonetheless, because the district court disagreed with that conclusion and called into question SUWA's standing,[38] SUWA briefly addresses standing here.

As to whether SUWA must independently show standing, this Court has previously concluded that under the Supreme Court's *Town of Chester* decision, SUWA is seeking "the same relief" in these cases as the United States—i.e., that the State and County's claims be denied—so it need not establish standing.[39] Indeed, because "another party with constitutional standing on the same side as [SUWA] remains in th[is] case" no independent showing of Article III standing is required.[40] Rather, standing requirements apply only where an intervenor "wishes to pursue relief not requested" by an existing party.[41] Because SUWA is seeking the same relief as the United States, standing is not required.[42]

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[38] *Kane Cnty. 2022*, 2022 WL 1978748, at *3-5.
[39] *Kane I Intervention*, 928 F.3d at 886-87.
[40] *San Juan Cnty.*, 503 F.3d at 1172.
[41] *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct 1645, 1648 (2017) (an intervenor must "meet the requirements of Article III if the intervenor wishes to pursue relief not requested" by an existing party).
[42] *Cf. Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 320 (D.C. Cir. 2015) ("[w]here an intervenor-defendant . . . meets the dictates of Federal Civil Rule 24, there is no need for another layer of judge-made prudential considerations to deny intervention.").

But even if independent Article III standing was required, SUWA has shown it.[43] Article III standing requires a litigant to show: "(1) it has suffered 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."[44] In *Kane I Intervention*, this Court held that, if SUWA was required to establish Article III standing, it had done so. The Court reasoned that SUWA identified an imminent and non-speculative impairment of its interests because the County and State intended to widen and improve the routes at issue, inevitably increasing traffic in scenic areas that SUWA sought to protect—an impairment that would be redressed by a decision in favor of the federal government.[45] The same conclusion follows here.

II. SUWA is entitled to intervene as of right.

SUWA is entitled to intervene as of right under Rule 24(a) if it brings a timely motion and can show (1) that it "claim[s] an interest relating to the property or

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[43] *See* App. II-430-48 (Decl. of Ray Bloxham); II-449-63 (Decl. of Liz Thomas); II-464-66 (Decl. of Tim D. Peterson Jr.).

[44] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180–81 (2000) (internal quotation marks omitted).

[45] *Kane I Intervention*, 928 F.3d at 888. *See id.* at 888-89 (explaining that injury to SUWA is not speculative); *see also San Juan Cnty.*, 503 F.3d at 1200, 1202 (holding there was nothing speculative about "the impact on SUWA's interests if the County prevails in its quiet-title action" because "[the County] will then pursue opening the road to vehicular traffic that SUWA has been trying to prevent.").

transaction which is the subject of the action;" (2) that its interest "may as a practical matter be impaired or impeded;" and (3) that its "interest is not adequately represented by existing parties."[46] This Court has "historically taken a 'liberal' approach to intervention and thus favors the granting of motions to intervene."[47] Rather than focusing on "rigid, technical requirements,"[48] the Court considers the "practical" effect the litigation would have on the proposed intervenor, evaluating the factors in a blended fashion.[49] Moreover, the "requirements for intervention may be relaxed in cases raising significant public interests," and this Court has already concluded that the environmental issues at stake in these R.S. 2477 cases warrant such relaxed treatment.[50] The Court reviews de novo each Rule 24(a) requirement.[51] As shown below, SUWA satisfies each element.

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[46] *Zinke*, 877 F.3d at 1164 (quoting *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1390 (10th Cir. 2009)) (original alterations omitted).

[47] *Id*. at 1164 (citing *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of the Interior* ("*Coalition of Cntys.*"), 100 F.3d 837, 840 (10th Cir. 1996)).

[48] *San Juan Cnty.,* 503 F.3d at 1195.

[49] *Id.* at 1188–89, 1193, 1195–96 (citing James Wm. Moore *et al*., Moore's Federal Practice § 24.03[1][b], 24–25 (3d ed. 2006)).

[50] *Kane I Intervention*, 928 F.3d at 896 (quoting *San Juan Cnty*., 503 F.3d at 1201) (additional citations omitted).

[51] *Coalition of Cntys.*, 100 F.3d 837, 840 (interest, impairment, and adequate representation are reviewed de novo); *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) (timeliness of intervention is reviewed de novo where the district court made no findings on timeliness).

A. SUWA's motion to intervene is timely.

The district court did not address whether SUWA's motion to intervene was timely. It is.[52] *Kane I Intervention* issued on June 5, 2019. On July 9, 2019, SUWA sought leave to file a motion to intervene, as the district court had prohibited SUWA from filing motions without leave as a permissive intervenor.[53] The district court granted leave on July 10, 2019, and SUWA filed its motion that same day.[54] The district court subsequently denied SUWA's motion, reasoning that it was not obligated to abide by *Kane I Intervention* until the mandate issued (which was delayed on account of then-pending *en banc* petitions).[55] After the mandate issued in *Kane I Intervention* on March 6, 2020, SUWA promptly filed a new motion to intervene (on April 6, 2020 after receiving leave from the district court).[56] The district court did not rule on SUWA's motion for over *two years*. When it finally did so on June 6, 2022, it maintained its prior position that SUWA

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[52] *See Kane I Intervention*, 928 F.3d at 890-91 ("'The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.'") (quoting *Utah Ass'n of Cntys.*, 255 F.3d at 1250 (additional citations omitted).

[53] App. VI-1546-47.

[54] App. VI-1550 (Order Granting Leave to File), VI-1551-81 (Motion to Intervene as of Right).

[55] *Kane Cnty., Utah (2), (3), & (4)*, 333 F.R.D. at 244.

[56] App. VII-1922-24 (Motion for Leave to File); VII-1936-39 (Order Granting Leave to File); VII-1940-66 (Motion to Intervene).

was not entitled to intervene as of right.[57] A motion to certify the order for interlocutory appeal[58] and this appeal promptly followed. Thus, there was no delay by SUWA and no other parties were prejudiced by the timing of SUWA's motion to intervene.

A. SUWA has a legally protected interest that may be impaired if intervention is denied.

A prospective intervenor must show "an interest relating to the property … which is the subject of the action."[59] Further, the intervenor must show it is "possible" that such interest "may be impaired or impeded" by the disposition of the action.[60]

This Court has repeatedly affirmed that SUWA's environmental concerns are a protectable interest that justifies intervention.[61] In *San Juan County* this Court, sitting *en banc*, held it "indisputable that SUWA's environmental concern is

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[57] *Kane Cnty. 2022*, 2022 WL 1978748 at *2.
[58] App. VIII-2344-50 (Motion for Certification).
[59] *Utah Ass'n of Cntys.*, 255 F.3d at 1249 (quoting Fed. R. Civ. P. 24(a)(2)).
[60] *Zinke*, 877 F.3d at 1167 (citations omitted).
[61] *Kane I Intervention*, 928 F.3d at 891-92 (concluding SUWA had an interest demonstrated by "decades-long history of advocating for the protection of these federal public lands" in R.S. 2477 proceeding in Kane County); *San Juan Cnty.*, 503 F.3d at 1199 (finding it "indisputable that SUWA's environmental concern is a legally protectable interest" that satisfies the 'interest' requirement for intervention as of right).

a legally protectable interest."[62] And in *Kane I Intervention*, the Court reiterated that, "[g]iven SUWA's decades-long history of advocating for the protection of these federal public lands, and the plaintiffs' stated objective of widening these roads, we conclude that SUWA has an interest that may be impaired by the litigation."[63]

In this case, the district court expressed "concern[s] about the [*Kane I Intervention*] majority's conclusions about SUWA's interests," and opined that the way this Court has analyzed SUWA's interest is "problematic."[64] But the court ultimately (and correctly) "assume[d] that SUWA has satisfied Rule 24(a)'s 'interest' prong."[65]

III. The United States may not adequately represent SUWA's interest on title or scope.

The final element SUWA must show is that the United States might not adequately represent its interest.[66] This is a low bar, imposing the "minimal" burden of showing that "the representation '*may be*' inadequate."[67] Moreover, as discussed, this Court has "'relaxed' intervention requirements in 'cases raising

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[62] *San Juan Cnty.*, 503 F.3d at 1199.
[63] *Kane I Intervention*, 928 F.3d at 892.
[64] *Kane Cnty. 2022*, 2022 WL 1978748, at *12.
[65] *Id.*
[66] *Kane I Intervention*, 928 F.3d at 892.
[67] *Id.* (emphasis added).

significant public interests' such as this one," and follows a "liberal approach to intervention."[68]

As explained below, this Court has already concluded that the United States may not adequately represent SUWA's interests as to scope, and the district court erred in declining to implement that decision. And while *Kane I Intervention* did not address the adequacy of the United States' representation as to title, SUWA has met its minimal burden to show the potential for inadequate representation there as well.

A. This Court has already concluded the United States may not adequately represent SUWA's interests on scope.

In *Kane I Intervention*, this Court held that "the United States may not adequately represent [SUWA's] interest" on scope.[69] As the Court explained, in cases where the existing party is the government, one of two initial presumptions applies, depending on whether the interests of the government and the proposed intervenors are "identical."[70] If the parties' interests are identical, an initial presumption of adequate representation applies (but can be overcome with "evidence to the contrary").[71] But, in the event the parties' interests are not

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[68] *Id.* at 896–97 (citation omitted).
[69] *Id.*
[70] *Id.* at 892.
[71] *San Juan Cnty.*, 503 F.3d at 1204–05.

identical, the presumption is reversed, and the showing of inadequacy "is easily made."[72]

With regard to the scope of an alleged (or adjudicated) R.S. 2477 right-of-way, this Court concluded in *Kane I Intervention* that "SUWA and the United States . . . do not" have "identical interests," given the United States' obligation to represent competing interests and its administrative concerns.[73] As such, "no presumption of adequate representation applies."[74] Moreover, "even if such a presumption were to apply, [the Court] would conclude that SUWA has rebutted it," in light of the fact that the change in presidential administration during the case "raise[d] the possibility of divergence of interest."[75]

The district court rejected these conclusions, ruling instead that "[t]he federal government is not always legally obligated to consider a broader spectrum of views," and that, here, "[i]t is litigating to protect its own exclusive title to

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[72] *Kane I Intervention*, 928 F.3d at 894.
[73] *Id.*
[74] *Id.* at 895.
[75] *Id.* As discussed below, the *Kane I Intervention* Court was referring to the Trump administration taking power during the pendency of that case. Although that administration is no longer in office, because these cases span multiple administrations, they inherently involve "the possibility of divergence of interest," which is all that is required to satisfy this Circuit's low bar for intervention as of right. *Id.*

property."[76] Indeed, though this Court rejected the argument that this is "merely a case about property rights," making clear it is in fact a case involving "public interests,"[77] the district court disregarded that holding, and instead concluded that "the United States is not litigating to protect the general public's rights" but instead is simply defending its own "property rights."[78] And though recognition of the affected public interests led this Court to hold that "[t]he United States may not adequately represent SUWA's interest,"[79] the district court's rejection of this Court's conclusions led it to hold the opposite.[80]

Thus, while the district court ostensibly stated that it was declining to implement *Kane I Intervention* because it was "distinguishable," in reality the district court simply disagreed with the decision. That is not a basis to decline to follow Circuit precedent. Rather, *Kane I Intervention* is binding precedent on the issue of the adequacy of the United States' representation of SUWA's interests. This case involves the same claims, the same legal issues, the same parties, and the same county as at issue in *Kane I Intervention.* The only difference between the cases is they address different roads in Kane County, a distinction that nobody has

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[76] *Kane Cnty. 2022*, 2022 WL 1978748, at *13.
[77] *Kane I Intervention*, 923 F.3d at 894.
[78] *Kane Cnty. 2022*, 2022 WL 1978748, at *13.
[79] *Kane I Intervention*, 923 F.3d at 892.
[80] *Kane Cnty. 2022*, 2022 WL 1978748, at *12-15.

argued, and the district did not hold, is a basis to distinguish *Kane I Intervention*. The Court should reverse and instruct the district court to implement *Kane I Intervention*.

B. The United States may not adequately represent SUWA's interest as to title.

This Court in *Kane I Intervention* addressed only the adequacy of representation on scope because that was all that remained in *Kane I* when SUWA sought intervention on remand. But the Court's reasoning likewise supports a finding of inadequate representation in this case as to title.

While this Court previously concluded that "SUWA and the United States ha[ve] identical interests in the title determination"[81] and, therefore, a presumption of adequate representation applies, that presumption may be overcome with "evidence to the contrary."[82] And in cases like this one, where the existing defendant is the government, "th[e] presumption [may be] rebutted by the fact that the public interest the government is obligated to represent may differ from the would-be intervenor's particular interest."[83]

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[81] *Kane I Intervention*, 928 F.3d at 894.
[82] *San Juan Cnty.*, 503 F.3d at 1205.
[83] *Kane I Intervention*, 928 F.3d at 892 (quoting *Utah Ass'n of Cntys.*, 255 F.3d at 1255). *See also Utah Ass'n of Cntys.*, 225 F.3d at 1255-56 ("the government's representation of the public interest generally cannot be assumed to be identical to

This Court has already concluded that the United States must represent "stakeholders involved" who do not share SUWA's interests while litigating R.S. 2477 cases.[84] And though that was in the context of "stakeholders . . . [who] want wider roads" while "SUWA is focused on pursuing the narrowest scope," the same conclusion holds true for title.[85] Many of the stakeholders to whom the United States is arguably beholden in this case wish to see these roads under the control of the State and Kane County, who plan to open presently closed routes and increase the volume of traffic on these routes ("[t]hat is the whole point of the suit").[86] Indeed, some of the stakeholders whose interests the United States must represent here are often more closely aligned with the State and Kane County than with SUWA. For example, the United States is interested in maintaining its relationship with Kane County and ensuring the county's continued assistance in maintaining or improving routes across public lands.[87] It is also interested in presenting legal

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the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation.").

[84] *Kane I Intervention*, 928 F.3d at 895.

[85] *Id.*

[86] *San Juan Cnty.*, 503 F.3d at 1201–02.

[87] *See* App. VII-2043-46 (Trial Tr. Harry Barber, the local BLM manager, conceding BLM is "dependent on [Kane County] . . . to maintain the roads in the Grand Staircase [-Escalante National Monument]."); VII-2047 (Manager Barber conceding that BLM was relying in 2013 on Kane County to maintain roads for which no R.S. 2477 adjudication had yet been made).

arguments that are consistent with the positions it asserts when defending the BLM's decisions in related Administrative Procedures Act litigation. Past administrative litigation has involved the United States taking positions that are contrary to SUWA and its interests in situations where the BLM's decisions are instead aligned with the County asserting R.S. 2477 rights.[88] And the United States has already demonstrated that these concerns affect how it defends title by declining to assert dispositive arguments as to title, not necessarily based on their legal merit,[89] but based on the United States' broader and divergent interests.

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[88] *See S. Utah Wilderness All. v. U.S. Dep't of Interior*, Case No. 2:19-cv-297-DBB, 2021 WL 1222158 (D. Utah March 31, 2021), *aff'd* 44 F.4th 1264 (10th Cir. 2022) (challenging BLM's determination that chip sealing a portion of the Burr Trail was within the scope of Garfield County's claimed R.S. 2477 right-of-way; BLM stood by its previous administrative determination that title to the right-of-way lay with the County after co-mingling historic evidence of public and permitted uses); *S. Utah Wilderness All. v. U.S. Bureau of Land Mgmt.*, 551 F. Supp. 3d 1226 (D. Utah 2021) (challenging BLM's determination that Kane County's replacement of a single-lane bridge on the Skutumpah road, located within the Grand Staircase-Escalante National Monument, with an engineered steel and concrete two-land bridge constituted maintenance). BLM has also allowed Kane County to improve R.S. 2477 rights-of-way that have not yet had a final Quiet Title Act adjudication as to scope and has facilitated the process in such a way as to avoid environmental objections from entities like SUWA. *See* App. VIII-2132-33 (Harry Barber Memo to File stating the Skutumpah Road provided important access across public lands and allowing Kane County to install an engineered steel bridge across Bull Valley Gorge without consulting with BLM); App. VIII-2135 (Email from BLM to Kane County agreeing to expedite approval of the Bull Valley Gorge bridge installment to avoid objection from SUWA).

[89] For example, the United States has refused to assert the argument that a 1970s road maintenance agreement between BLM and Kane County triggered the statute

Moreover, "the United States must consider internal interests, such as the efficient administration of its own litigation resources," an "interest that SUWA certainly doesn't share."[90] This Court has already recognized that "the United States . . . 'ha[s] 12,000 of these claims statewide' and is 'interested in trying to resolve them as quickly and efficiently as [it] can'"[91]—a divergent administrative interest that applies just as much to title as it does to scope. Regardless of how these claims are ultimately resolved (through litigation or settlement), SUWA will remain focused on fully defending routes that impact its interests in preserving wilderness-quality landscapes across Utah, a position the United States simply cannot prioritize in the same way. Indeed, the risk of inadequate representation here is not theoretical; it has already played out in how the United States' interest in the efficient administration of its resources has impacted (adversely from SUWA's perspective) how the United States has litigated title issues in this case.

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of limitations for the Quiet Title Act—not because the argument lacks merit, but because of the potential future ramifications on the United States' relationship and dealings with the County, an interest SUWA does not share. *See* App. VII-1953 (2020 Motion to Intervene). Thus, rather than assert a dispositive defense that would adjudicate *title* to those claims with prejudice, the United States has elected to argue there is no "disputed title" on those claims, which as a practical matter leaves them open to any and all uses, contrary to SUWA's interests.

[90] *Kane I Intervention*, 928 F.3d at 895.

[91] *Id.* (citation omitted) (alterations in original).

SUWA has shown not just that the United States *may* not adequately its interests on title, but that United States has failed to adequately represent those interests.

While those concrete examples of the United States' obligation to represent competing interests and concerns related to "the efficient administration of its own litigation resources" rebut any presumption of adequate representation,[92] this Court has also held that "the possibility of divergence of interest or a shift during litigation" due to changes in presidential administration would similarly "rebut" a "presumption of adequate representation."[93] Specifically, this Court concluded that different administrations "may be more inclined to settle"—that is give away *title*.[94] And while that acknowledgment was made in the context of President Trump taking office, the reasoning holds with equal force today. Indeed, the very fact that this case has spanned multiple presidential administrations, some of which "may not adequately represent SUWA's interest,"[95] shows that "the United States *may* not

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[92] *Kane I Intervention*, 928 F.3d at 895.
[93] *Id.* at 890 n.17, 895–96.
[94] *Id.* at 896. How the United States' divergent interests may impact settlement discussions is particularly salient here. In 2015, fifteen of the hundreds of routes at issue in Kane County were chosen for discovery and trial in a bellwether proceeding, with the objective that "the findings and judgments will then become the bases for a global resolution of all of the pending road cases." App. II-468 (Order Appointing Special Master). Thus, settlement, rather than a vigorously contested judicial process, is likely to determine the outcome for the vast majority of the alleged rights-of-way.
[95] *Kane I Intervention*, 928 F.3d at 892.

adequately represent its interests" throughout the duration of the case, which is all SUWA must show to satisfy the "minimal" burden of intervention as of right.[96]

Finally, when this Court previously addressed adequacy of the United States' representation of SUWA's interests as to title in *San Juan Cnty.*, the Court assumed that representation would be adequate because SUWA at that time "ha[d] provided no basis to predict that the Federal Defendants will fail to present pertinent evidence uncovered by SUWA or an argument on the merits that SUWA would make."[97] Now, with over a decade of litigation behind the parties, including a three-week bellwether trial (which SUWA was prohibited from directly participating in), it has become clear that assumption was not accurate.

As to whether SUWA would provide additional evidence, before being excluded from this case entirely, SUWA retained its own expert on aerial imagery and geographic information system mapping ("GIS"), Mr. Gerald Hughes, who would have complemented and supplemented the United States' expert (but who was not permitted to testify at the bellwether trial).[98] Mr. Hughes, for example, reviewed aerial imagery from the 1960s that the United States' expert did not

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[96] *Id.* at 896-97.
[97] *San Juan Cnty.*, 503 F.3d at 1206; *see also Kane Cnty.*, 597 F.3d at 1134-35.
[98] App. VII-2022-34 (Bio-West report excerpts demonstrative exhibits). SUWA was not permitted to present its GIS expert, Mr. Gerald Hughes, nor introduce significant evidence identified in his report that was not considered by the United States' expert.

review. The United States did not meet with Mr. Hughes, and did not use this imagery in its case in chief nor to cross-examine Kane County's sole expert witness. SUWA also hired an expert historian, Dr. Emily Greenwald, who considered different materials than the United States' expert historian, and who would have provided testimony regarding historical federal funding of projects on public lands in addition to describing evidence for on-the-ground practical implications of federal regulations (but who was also not permitted to testify).[99] Finally, SUWA identified its own witness, Mr. Michael Salamacha, who provided testimony that as a then-BLM ranger in the Kanab field office he posted signs stating certain areas of BLM lands were closed to motor vehicles in the mid-1990s, thus triggering the statute of limitations on certain bellwether claims.[100]

And as to the second point—that back in 2007 there was no basis to predict that the United States would decline to make an argument SUWA wished to press—as explained above, SUWA has, in fact, sought to make certain arguments

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[99] SUWA was prohibited from calling Dr. Greenwald to testify and introduce evidence identified by Dr. Greenwald in her expert and supplemental expert reports. *See id*. at VII-1893 (Order prohibiting SUWA from directly participating in trial). Rather, SUWA was left to plead with the United States to introduce this evidence, which it largely declined to do. *See id*.

[100] *See id.* at 2112-16 Although Mr. Salamacha was SUWA's witness, SUWA was prohibited from presenting his testimony and while the United States used his deposition in their post-trial brief, it did not present the testimony live at trial.

(including that maintenance agreements between the United States and Kane County triggered the statute of limitations) that the United States has refused to raise for reasons related to its own (divergent) administrative interests.

Ultimately, SUWA satisfies the "minimal" burden of showing that "the representation '*may be*' inadequate" under the "relaxed" intervention standard applicable to cases "rais[ing] significant public interests."[101] Given the government's obligation to represent a range of interests, the requirement that it make litigation decisions based on its administrative concerns, and the fact that the presidential administration could change several times during these decades-long cases, the United States *may* not adequately represent SUWA's interests as to title. That is all that this Circuit requires.

C. A finding of inadequate representation on scope warrants intervention on both scope and title.

Even if this Court were to hold that the United States' representation of SUWA's interests is inadequate only as to scope, SUWA should be allowed to intervene without subject-matter restriction because there is no practical way to segregate litigation over scope and title. As this Court has recognized, the issues

[101] *Kane I Intervention*, 928 F.3d at 892, 894, 896-97.

of scope and title are connected.[102] Indeed, the district court observed that "ownership and scope are the two sides of the same coin that comprises title."[103] Moreover, evidence on scope and title are "presented in the same trial and without bifurcated proceedings."[104] Thus, as a practical matter, it is not possible to allow SUWA's intervention as to scope, but not title. The evidence and law mobilized to argue for the most limited scope of the rights-of-way at issue is the same evidence that will show that no rights-of-way exist in the first instance.[105] Because these issues are intertwined, there is no practical way to limit SUWA's role with respect

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[102] *Id.* at 894 ("We agree with the district court that 'scope is inherent in the quiet title process.'") (quoting *Kane Cnty. v. United States*, No. 2:08-cv-315-CW, 2018 WL 3999575, at *3 (D. Utah Aug. 21, 2018)).

[103] *Kane Cnty. 2022*, 2022 WL 1978748 at *8.

[104] *Id.*

[105] For example, scope is intimately connected with the pre-1976 uses of the right-of-way, and those uses are also vital to determining if plaintiffs have established their title. *Compare Kane Cnty.,* 772 F.3d at 1223 (explaining that scope must be determined "*in the light of traditional uses"*) (emphasis in original) (citation omitted), *with San Juan Cnty.*, 754 F.3d at 799 (explaining that the frequency and variety of use "were critical common-law inquiries into the acceptance of an R.S. 2477 right-of-way") (citation omitted). Judge Ebel and three other judges previously came to this same conclusion in 2007: "Because this quiet title action will affect not only *whether* Utah or San Juan County have any right-of-way or easement … but the scope of such an easement, the potential and even likelihood of a conflict between the positions of the United States and SUWA cannot be avoided. If there is an easement, it must be founded on historic usage, and that historic usage will define the scope of the easement. SUWA, accordingly, has a vital interest in ensuring as an intervenor that the record is fully and fairly developed as to the historic public usage of this alleged right-of-way." *San Juan Cnty.*, 503 F.3d at 1229 (Ebel, J. dissenting).

to the title determination without also impeding SUWA's ability to protect its interests with respect to scope.

CONCLUSION

SUWA has satisfied all requirements under Rule 24(a) to intervene as of right in this case. The district court erred in denying SUWA's timely motion and its order should be reversed and intervention as of right granted.

November 7, 2022

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STATEMENT REGARDING ORAL ARGUMENT

SUWA submits that oral argument would assist the Court in resolving the issues in this case because of the complexity of the facts of this case and the important legal issues presented.

Date: November 7, 2022

/s/ Michelle White

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(D)(2)(A) because this brief contains 7,974 words, excluding the parts of the brief exempted under Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in 14 point Times New Roman.

DATED this Seventh day of November, 2022.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that on November 7, 2022, the undersigned electronically transmitted the foregoing **APPELLANT SOUTHERN UTAH WILDERNESS ALLIANCE ET AL.'S OPENING BRIEF** to the Clerk's Office for the United States District Court for the District of Utah using the District Court's CM/ECF System, which shall electronically serve a copy of the foregoing upon counsel of record for all parties in the above-captioned case.

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