No. 22-4087

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Kane County, Utah
Plaintiff-Appellee

The State of Utah
Plaintiff-Intervenor-Appellee
v.
The United States of America
Defendants-Appellees

Southern Utah Wilderness Alliance *et al.*
Defendants-Intervenors-Appellants

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

JOINT ANSWERING BRIEF OF PLAINTIFF-APPELLEES STATE OF UTAH AND KANE COUNTY, UTAH

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Oral argument requested.

Dated: February 6, 2023

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PRIOR OR RELATED APPEALS

Plaintiff-Appellees the State of Utah ("State") and Kane County, Utah ("County") identify the following prior and/or related appeal: *In re: Southern Utah Wilderness Alliance, et al.*, No. 19-4134 (10th Cir. 2019).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(b). However, the State and County contend that the Court lacks jurisdiction because Appellee SUWA[1] lacks standing, and "Article III standing to litigate cannot be waived." *Kane Cnty. v. United States*, 333 F.R.D. 225, 231 (D. Utah 2019) (citation omitted). The State and County discuss SUWA's standing in further detail below.

STATEMENT OF ISSUES

1. Whether SUWA has standing.

2. Whether the district court erred in denying SUWA's motion for reconsideration of its earlier motion to intervene.

[1] Appellants are the Southern Utah Wilderness Alliance, the Wilderness Society, the Grand Canyon Trust, and the Sierra Club (collectively "SUWA").

STATEMENT OF THE CASE

Even though this case is in its post-bellwether trial stage, SUWA sought reconsideration of its earlier motion for intervention—for the fifth time—which the district court denied ("Order"). *Kane Cnty. (2) v. United States*, No. 2:10-cv-1073-CW, 2022 U.S. Dist. LEXIS 100974, at *81 (D. Utah June 6, 2022). (Aplt. App. Vol. VIII at 2290.)[2] *See also* Order, attached as Addendum A for the Court's convenience, not renumbered from Appellant's Appendix. The following is a brief summary of the applicable legal standards related to federal cases under the Quiet Title Act, an abbreviated history of relevant roads cases, and a summary of the complex procedural posture of this case.

I. R.S. 2477 Rights-of-Way.

Revised Statute (R.S.) 2477 was an open-ended grant of public highway rights-of-way. Enacted as Section 8 of the Act of July 26, 1866, entitled "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands and for Other Purposes," ch. 262, 14 Stat. 251, 253, the statute was codified in 1873 as section 2477 and subsequently

[2] Pursuant to 10th Cir. R. 28.1, citations to the Appendix shall be Aplt. App. Vol. x at xx and Supp. App. Vol. x at xx.

recodified in 1938 as 43 U.S.C. § 932. In its entirety, the statute provides that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." *Id.*

R.S. 2477 "remained in effect for 110 years, and most of the transportation routes of the West were established under its authority." *S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 740 (10th Cir. 2005). "During that time congressional policy promoted the development of the unreserved public lands and their passage into private productive hands; R.S. 2477 rights of way were an integral part of the congressional pro-development lands policy." *Id.* at 740-41.

> In 1976, however, Congress abandoned its prior approach to public lands and instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation. As part of that statutory sea change, Congress repealed R.S. 2477. There could be no new R.S. 2477 rights of way after 1976. But even as Congress repealed R.S. 2477, it specified that any 'valid' R.S. 2477 rights of way 'existing on the date of approval of this Act' (October 21, 1976) would continue in effect.

Id. at 741 (citations omitted).

R.S. 2477 rights-of-way vested by operation of law without "administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public

acceptance on the part of the states or localities in whom the right was vested." *Id.* "R.S. 2477 creates no executive role for the BLM to play." *Id.* at 754. Because there is no agency action involved, disputed title to R.S. 2477 rights-of-way is "to be resolved by the courts." *Id.* at 752.

Recognizing that R.S. 2477 rights-of-way vest by operation of law, without agency action or the need for prior adjudication, this Court held that the State and County may continue to maintain and repair their roads without prior federal approval, but they must first consult with the federal land manager prior to widening, upgrading, or improving the roads. *Id.* at 748-49 (distinguishing maintenance and repairs from upgrades and improvements). "'Maintenance' preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes." *Id.* at 749 (quotation omitted).

Before the State and County can widen, upgrade or improve a road, they must "consult with the appropriate federal agency and obtain its approval before making improvements 'beyond mere maintenance' to their rights-of-way." *S. Utah Wilderness All. v. United States DOI*, 44 F.4th 1264, 1268 (10th Cir. 2022). Consultation is the process where SUWA has an opportunity to present its environmental concerns. *Id.* at

1270. This maintenance and repair versus upgrades and improvements dichotomy "protects existing uses without interfering unduly with federal land management and protection." *S. Utah Wilderness All.*, 425 F.3d at 749.

For many years R.S. 2477 rights-of-way existed in peace and served the public good. More recently, these roads have "become a flash point, and litigants are driven to the historical archives for documentation of matters no one had reason to document at the time." *Id.* at 742.

II. The Federal Quiet Title Act.

For nearly 200 years, sovereign immunity prevented a plaintiff from directly challenging the United States' title. "Congress sought to rectify this state of affairs" by adopting the Quiet Title Act of 1972. *Block v. North Dakota*, 461 U.S. 273, 282 (1983). Under the Quiet Title Act, the "United States may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a).

In the context of R.S. 2477, a suit to quiet title involves the "narrow" issue of the "existence or non-existence of a right-of-way and

its length and its breadth [scope]." *San Juan Cnty. v. United States*, 503 F.3d 1163, 1206 (10th Cir. 2007) (quotations omitted). In Utah, proof of acceptance of the grant of an R.S. 2477 right-of-way requires evidence that the State and County designated a road as a general public highway or that the public made continuous use of the road as a thoroughfare on unreserved public land for ten years prior to 1976. *S. Utah Wilderness All.*, 425 F.3d at 772-74 (describing public uses). Thus, the relevant and admissible evidence in an R.S. 2477 quiet title suit includes public land records, maps, aerial imagery, and the testimony of people who traveled the roads prior to 1976.

Beyond testing the evidence, the United States may raise affirmative defenses such as the lack of a disputed title (no case or controversy) or that the statute of limitations has run. *See Kane Cnty.*, 772 F.3d at 1211-12, and 1214-16 (2014)[3] (discussing disputed title and statute of limitations).

"Members of the public as such do not have a 'title' in public roads." *Kinscherff v. United States*, 586 F.2d 159, 160 (10th Cir. 1978).

[3] Because of the multiple cases with *Kane Cnty.* as the first named party, Plaintiff-Appellees will include the year parenthetical in the case citation for ease of reference where confusion might occur.

"To hold otherwise would signify some degree of ownership as an easement. It is apparent that a member of the public cannot assert such an ownership in a public road." *Id.*

No fact, element, or affirmative defense in an R.S. 2477 quiet title suit involves environmental or non-title claimant's interests. "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*." (Order, Add. A (emphasis in original); Aplt. App. Vol. VIII at 2303.)

Despite its lack of any title interest to pursue or defend, this appeal is SUWA's fifth attempt at intervention in *Kane County (2)*, a "narrow" title suit. (*Id.* at 2291.) SUWA's professed interest in federal land management is neither relevant nor admissible in this title suit.

III. History of Kane County roads cases.

In 2008 the State and County sued the United States to quiet title to 15 R.S. 2477 rights-of-way under the Quiet Title Act. That case is now known as *Kane County (1)*. (*Id.* at 2294.) As discussed below, this Court denied SUWA's first two attempts to intervene in 2010 and 2014. Years later, a divided panel allowed SUWA to intervene in *Kane County*

(1) on its third attempt in this Court. *See Kane County v. United States,* 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).

In 2010 the County, later joined by the State, filed the underlying lawsuit, known as *Kane County (2)*, to quiet title to the rest of their R.S. 2477 rights-of-way. (Aplt. App. Vol. I at 9.) Amended and additional complaints to quiet title—2:11-cv-1031, *Kane County (3)*, and 2:12-cv-00476, *Kane County (4)*—were consolidated and merged into *Kane County (2)* on April 18, 2013. (*Id.* at 15-16.)

In 2013, the district court was tasked with "case management on about twenty other R.S. 2477 cases pending in this district" alleging claims to approximately 12,000 roads (the "Road Cases"). (*Id.* Vol. VIII at 2291; Order, Add. A.)

IV. SUWA's Efforts to Intervene in Prior Southern Utah County Roads Cases.

As previously noted, SUWA has been attempting intervention in the Roads Cases in Utah for almost two decades. SUWA's repeat and successive motions have largely been unsuccessful, but the deluge of filings has cost the parties and the court significant sums of money and

delayed resolution of the claims. Rather than intervention by right, courts have accommodated SUWA's involvement as an amicus curiae.

A. San Juan County's Salt Creek Road Lawsuit.

In 2004, San Juan County sued to quiet title to the Salt Creek Road in San Juan County pursuant to R.S. 2477. *See San Juan Cnty. v. United States*, 503 F.3d 1163, 1170 (10th Cir. 2007). After the district court denied SUWA's motion to intervene, a divided panel of this Court allowed intervention. *Id*. at 1167. Sitting en banc, this Court ultimately held that SUWA was "not entitled to intervene as of right because it failed to overcome the presumption that its interest was adequately represented by the Federal Defendants." *Id*. at 1167. The Court held that the United States adequately represented SUWA's interests "with respect to the quiet title claim" because the only issue was "the existence or non-existence of a right-of-way and its length and its breadth"—i.e. scope. *Id*. at 1206 (quotation omitted).[4] Indeed, the Court

[4] SUWA is wrong to assert that the divided panel decision in *Kane I* was the "first time" this Court considered SUWA's interests in the scope of the rights-of-way. (SUWA Br. at 8.) The district court correctly noted that "the issue of title and scope were reviewed in the *San Juan* case and SUWA was nevertheless denied intervention." (Order, Add. A; Aplt. App. Vol. VIII at 2304.)

held that "SUWA could have had no other objective regarding the quiet-title claim." *Id. San Juan County* is still good law.

B. *Kane County (1), Utah v. United States*, No. 2:08-cv-315.

Relating to intervention in *Kane County (1)*, this Court affirmed the district court's denial of intervention twice before a divided panel allowed SUWA to intervene on its third attempt. *Kane Cnty. (1)*, 928 F.3d at 883 (2019). Those three separate intervention attempts in this Court, plus the two district court motions, kept the real parties hopping between SUWA's repeated intervention litigation for over 10 years.

Seven months after Kane County filed suit to quiet title in *Kane County (1)*, SUWA moved to intervene as of right under Fed. R. Civ. P. 24(a)(2). The district court denied intervention. *See Kane Cnty. v. United States*, No. 2:08-CV-315, 2009 U.S. Dist. LEXIS 29357 (D. Utah Apr. 6, 2009). This Court affirmed, holding that SUWA "failed to establish that the United States may not adequately represent SUWA's interest." *Kane Cnty. v. United States,* 597 F.3d 1129 (10th Cir. 2010).

The district court held a bench trial in *Kane County (1)* in March 2010. *See Kane Cnty. (1) v. United States*, No. 2:08-cv-00315, 2013 U.S. Dist. LEXIS 40118, at *3 (D. Utah Mar. 20, 2013). "At trial, the court

heard from twenty-six witnesses and received over one hundred and sixty exhibits." *Kane Cnty. (1)*, 928 F.3d at 883 (2019). SUWA participated as an amicus curiae party. *Id*. The district court ultimately found that the State and County proved their title to R.S. 2477 rights-of-way for twelve of fifteen of the roads, as well as the scope. *Id.*

Notably, and with reference to the point that there is no bifurcated proceeding or separate decision for title and scope, the district court quieted title to existence and "scope" of the Bald Knoll and Mill Creek road rights-of-way at 50 feet, extending "25 feet on both sides of the center line for these roads." *Kane Cnty. (1)*, 2013 U.S. Dist. LEXIS 40118, at *180. The district court's Final Order Quieting Title is provided in Supp. App. Vol. II at 0474. The district court's decision on the Millcreek and Bald Knoll roads was not appealed and the order quieting title did not authorize any upgrades or improvements to the roads within their confirmed rights-of-way. *Id.*

Nevertheless, the parties filed cross-appeals regarding other issues decided by the district court, and SUWA promptly moved to intervene on appeal. This Court "summarily denied SUWA's motion to intervene in the cross-appeals" in an unpublished order. *Kane Cnty. (1)*,

928 F.3d at 884 (2019). (Order, Add. A; Aplt. App. Vol. VIII at 2291.) On appeal, this Court reversed the district court's scope determination on three of the rights-of-way and remanded to the district court. *Id.*

After remand, the parties discussed settlement, but nothing came of it. Later, in an entirely unrelated action, President Trump reduced the size of the Grand Staircase Escalante National Monument ("Monument"). One of the three roads on remand was within the de-established area of the Monument, while the other two remained within the Monument. Shortly thereafter, SUWA filed yet another motion to intervene. *See Kane Cnty. (1)*, 928 F.3d at 886 (2019).

Ultimately, a divided panel of this Court allowed intervention. Much of its decision relied on the standard of review, which it based on a *de novo* standard. The Court held that the district court erroneously considered the motion to intervene as a request to reconsider the denial of SUWA's earlier 2008 motion, as opposed to a new motion under "a new political and legal landscape that did not exist when SUWA moved to intervene a decade ago." *Kane Cnty. (1)*, 928 F.3d at 889 (2019).

The Court also held that the United States failed to adequately represent SUWA's interests, and therefore intervention was necessary,

because SUWA's interest *in scope* was separate and distinct. *Id*. at 894. The Court found it noteworthy in its adequate representation analysis that the parties had attempted settlement and that the United States objected to SUWA's intervention motion. *Id*. at 895-896. Thus, the Court concluded that "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 satisfied its 'minimal' burden of showing that the United States may not adequately represent its interests." *Id*. at 896-97 (cleaned up). SUWA now relies on this decision for its argument that intervention in this case—and indeed every Roads Case going forward—is required. (SUWA Br. at 5 (the "*Kane I Intervention* decision is in fact binding").)

C. Judge Tymkovich's Dissent.

Then-Chief Judge Tymkovich dissented from the *Kane County (1)* intervention decision upon which SUWA now relies. *Kane Cnty. (1)*, 928 F.3d at 897 (2019). Judge Tymkovich first reasoned that SUWA lacked standing "both under Article III and under the third-party standing doctrine." *Id*.

Second, Judge Tymkovich disagreed that the standard of review should have been *de novo*, noting that "successive motions for intervention in the same case are frequently treated as motions to reconsider," which principle is "rooted in the law-of-the-case doctrine and the mandate rule." *Id*. at 902 (collecting authority). Judge Tymkovich noted that "SUWA based its renewed motion for intervention on changed circumstances—namely a new legal and political landscape." *Id*. "SUWA's reliance on an intervening change of law or fact tracks the test for a motion to reconsider, not a motion to intervene." *Id*. Finally, after going through the intervention analysis, Judge Tymkovich concluded, "Because I believe SUWA lacks standing to intervene and because the district court did not abuse its discretion in denying SUWA's motion to intervene under Rule 24(a), I respectfully DISSENT." *Id*. at 906.

D. En banc and Supreme Court Certiorari Petitions.

On February 27, 2020, this Court split 5/5 on the parties' request for rehearing en banc. *Kane Cty. v. United States*, 950 F.3d 1323 (10th Cir. 2020). The en banc rehearing order mirrored the 2019 *Kane County (1)* opinion, with a concurrence denying rehearing, authored by Judge

Phillips, and a dissent arguing for rehearing en banc, authored by Judge Tymkovich. *Id*. The concurrence argued that the panel decision "fit[] well within controlling precedents." *Id*. at 1324. The dissent, however, argued that "[t]he panel majority's decision rests on an overbroad understanding of Article III standing and extends a right of intervention to third parties who have no legal interest at issue in the dispute." *Id*. at 1330.

The State and County, and the United States, submitted petitions for certiorari to the United States Supreme Court, which were relisted following two conferences but ultimately denied on January 25, 2021. *See Kane Cnty. v. United States,* 141 S. Ct. 1283 (2021); *United States v. Kane Cnty.,* 141 S. Ct. 1284 (2021).

V. The Present Case—*Kane County (2), Utah v. United States*, No. 2:10-cv-1073, and SUWA's Five Motions to Intervene.

Commencing in 2010, the State and County filed to quiet title (length and breadth) to its R.S. 2477 rights-of-way. (*See*, e.g., Aplt. App. Vol. I at 159.) After years of jurisdictional and standard discovery, the district court held a Bellwether trial over three weeks in February 2020. (*Id*. Vol. VII at 1970.) Shortly after trial ended, on March 10, 2020, SUWA filed its fifth motion to intervene as of right. (*Id*. Vol. I at 66.)

SUWA's intervention motion has delayed trial closing arguments, resolution of a pending motion to dismiss for lack of jurisdiction by the United States, and other post-trial proceedings. (*Id*. at 79 ("On September 22, 2021, the court held a Status Conference at which the State of Utah requested that the court decide the pending [] Motion for Intervention.").)

Ultimately, in *Kane County (2),* the district court will decide whether the United States *or* the State and Kane County *already* own title to various public highway rights-of-way. Meanwhile, in the intervening 12 years, SUWA's five unsuccessful intervention motions and other actions have greatly multiplied the proceedings and wreaked havoc on the fair and efficient resolution of this case.

A. SUWA's First Motion to Intervene.

On April 22, 2013 SUWA filed its first motion to intervene on the *Kane County (2)* docket. (Order, Add. A; Aplt. App. Vol. VIII at 2291; Supp. App. Vol. I at 0091.) The district court had previously noted, on April 17, 2013 when *Kane County (3)* and *(4)* were consolidated, that prior motions to intervene were pending, had been briefed, and were "set for hearing, but not before depositions begin." (Aplt. App. Vol. I at

15.) Further, the district court noted it was "not confident the movant-intervenors can participate in depositions without the parties' consent and denies they be accepted as Proposed Intervenors." (*Id.*)

SUWA argued in its April 22, 2013 motion to intervene that intervention was appropriate because (1) it was timely, as the case was in its initial phases, (2) SUWA's conservation interests were sufficient to constitute an interest in the property which is the subject of the action, (3) its interest would be impaired without its involvement, and (4) the United States did not adequately represents SUWA's interests. (Supp. App. Vol. I at 98-143.) SUWA also argued that it satisfied the elements for permissive intervention as well. (*Id.* at 143-146.)

B. SUWA's Second Motion to Intervene.

SUWA filed a second nearly identical intervention motion on April 23, 2013. (Supp. App. Vol. I at 151.) On September 10, 2014, the district court granted in part and denied in part the first and second motions to intervene, denying SUWA intervention as of right, but granting permissive intervention subject to certain conditions. (Supp. App. Vol. II at 523-26.) The district court adopted the same reasoning against intervention as of right that it found in *Sevier County v. United States*,

No. 2:12-cv-452, 2013 U.S. Dist. LEXIS 83388 (D. Utah June 12, 2013). Namely, the district court denied intervention in that case because of the United States' adequate representation where "the United States and SUWA have a single objective, which is to defeat the State and county claims to title." *Id.* at *13. Further, SUWA "failed to demonstrate that it has an expertise the United States lacks for the time period at issue in this case." *Id.* at *16. As for permissive intervention, the district court's order set certain limitations on SUWA's participation going forward related to discovery, claims and defenses, motions, settlement participation, and trial participation. *Id.* at 18-21. (Supp. App. Vol. II at 523-26.)

C. SUWA's Third Motion to Intervene.

Pursuant to the earlier permissive intervention order in *Kane County (2)*, SUWA was not allowed to file any motion without prior leave of the district court. Thus, on May 15, 2018, SUWA filed a motion for leave to file a renewed motion for intervention as of right. (Supp. App. Vol. II at 523.) In a docket text order dated May 17, 2018, the district court denied SUWA's motion. (Aplt. App. Vol. I at 42 ("The court denies SUWA leave to file a renewed motion to intervene as of right

because SUWA has presented no change in circumstance that would justify such a motion.").) After proceedings were held before the district court on May 21, 2018, the district court allowed SUWA to lodge its motion to preserve the record, which SUWA did on May 25, 2018. (*Id.* Vol. II at 533-554.)

In its renewed motion, SUWA argued that "[g]ood cause now exists to revisit the Intervention Order." (*Id.* at 535.) According to SUWA, "the change in the Presidential Administration has 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.*)

At a June 6, 2018 hearing to address a proposed amendment to the permissive intervention order, the district court noted that it saw,

> no basis on the present records to believe that the United States is not and will not continue to vigorously defend the title of the United States to these roads. There are some issues, and I want to emphasize this, that are more political than legal in nature in this case. I fully respect the rights of the intervenors to assert these political issues. They have legitimate interests on behalf of their constituents, but this is not the proper forum those for those political issues. They can raise those issues in a different forum.

> If we determine that a road has been established as the public right-of-way, and they believe access across that road interferes with some public good, there is a political forum in which they can address that and attempt to limit the access and use of that road. But that's not the purpose of this case and that's not the purpose of the trial as we will proceed in this case.

(*Id.* Vol. III at 633-34.)

On August 21, 2018 the district court filed an order denying the renewed motion to intervene and confirmed 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." (*Id.* Vol. IV at 1149-50.)

D. SUWA's Fourth Motion to Intervene.

After filing a motion for leave to file (*id.* Vol. VI at 1546-48) and being granted such leave (*id.* at 1550), SUWA filed its fourth motion to intervene as of right on July 10, 2019 (*id.* at 1551-1583). SUWA filed the motion after this Court issued its order in *Kane County (1)*, 928 F.3d 877 (2019). SUWA argued, "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." (*Id.* at 1553.) In its motion, SUWA argued it has an interest impaired by the

litigation and that the United States did not adequately represent SUWA's interests. (*Id.* at 1557.)

Due to the quickly approaching trial date, the district court ordered opposition memoranda due by July 15, 2019. (*Id.* at 55.) Kane County filed an opposition memorandum to the fourth motion to intervene on July 15, 2019 (*id.* at 1680-83) noting its intention to seek en banc review of this Court's decision in *Kane County (1)* and that until the mandate issues, SUWA was not a party in that case. Accordingly, the county requested that the district court defer its decision pending further developments. (*Id.*)

At a July 17, 2019 motion hearing, the district court heard from the parties related to an agreement to allow SUWA to participate at trial, while the issues were pending at the Tenth Circuit, as if it was a party while its intervention motion was pending. (*Id.* at 1709-10.) Thus, the district court found the pending motion to intervene moot. (*Id.* at 1741.) The district court also continued the trial six months—to February 2020—so SUWA could have time to prepare. (*Id.* at 1709.)

SUWA revived the fourth motion to intervene on July 25, 2019 (*id.* at 1744-1753) and argued that the district court's order imposed

restrictions on SUWA's trial participation not contemplated by the parties' agreement, and therefore SUWA wanted its intervention motion heard. The United States, the State of Utah, and Kane County all opposed the motion insofar as it sought a decision on the motion to intervene. (*Id.* at 1756-69.)

On September 5, 2019 the district court denied on the merits SUWA's fourth motion to intervene. (*Id.* Vol. VII at 1819-56.) *See also Kane Cnty., Utah (2), (3), & (4) v. United States*, 333 F.R.D. 225, 228–29 (D. Utah 2019). After providing background on pending Roads Cases, the district court noted that SUWA failed to mention standing "or meet its obligation to explain how it has standing before the court" in its May 25, 2018 or July 10, 2019 intervention motions. (*Id.* at 1826.) The court noted "standing to litigate cannot be waived." (*Id.* (quotation omitted).) The district court concluded SUWA had no standing. (*Id.* at 1832.)

The district court also concluded since the United States was "litigating to protect its own exclusive title to property," it was not obligated to consider other views, and representation was deemed adequate even if "they may have diverging views about how title is to be quieted." (*Id.* at 1833-34.) Further, the district court found:

> The fact that we now have a different President than when this action commenced does not alter the court's analysis. 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. The fact that no settlement has occurred on any R.S. 2477 road in Utah while President Trump has been in office does not support intervention as of right.

(*Id.* at 1837.)

As a result of the district court's denial of its fourth motion to intervene, SUWA filed a petition for writ of mandamus with this Court, seeking reassignment of ongoing Roads Cases to a different judge, and seeking review of the intervention motions. (*Id.* at 1883-1890.) On October 25, 2019, this Court denied the writ of mandamus. (*Id.*[5])

E. SUWA's Fifth Motion to Intervene.

Shortly after trial ended in February 2020, SUWA filed a motion for leave to file a fifth intervention motion as of right based on the denial of en banc review and the mandate issuing for *Kane County (1)*

[5] Although the actual parties were not required to respond, the writ could be practically considered as another motion to intervene. Resolving SUWA's writ did require this Court's time and resources.

on March 10, 2020. (*Id*. at 1922-26.) SUWA noted that its request would also eventually include a request for a new trial, "to protect its interests and cure the prejudice caused by SUWA's inability to participate in the Bellwether proceedings during the period it was incorrectly denied intervention, including at trial." (*Id*. at 1924.) The district court ordered expedited briefing on SUWA's motion for leave to file, which the parties did not oppose and which the district court granted. (*Id.* Vol. I at 66-67.)

SUWA then filed its fifth motion to intervene—the one now on appeal—on April 6, 2020. (*Id*. VII. at 1940-68.) In it, SUWA again argued that the district court was obligated to apply *Kane County (1)* to this case and allow SUWA to intervene as of right. First, SUWA argued, it has an interest that may be impaired by this litigation. (*Id*. at 1946.) Second, SUWA argued that the United States does not adequately represent SUWA's interests. (*Id*. at 1948.)

The United States responded (*id*. at 2048-2052) that SUWA was "presumptively [] entitled to intervene as of right in the portion of this case that relates to scope." (*Id*. at 2049.) The United States opposed SUWA's arguments, though, relating to intervention in the portion of the case relating to title for the reasons stated in its previous

oppositions to SUWA's prior motions to intervene. (*Id*.) Indeed, the United States noted the *Kane County (1)* decision was limited "to questions of scope if title were quieted." (*Id*. at 2050.) "[A]lthough [SUWA] may be able to intervene as of right in the portion of this case that relates to scope, their intervention in the portion of this case that relates to the predicate title determination should be limited to a permissive status (with appropriate conditions)." (*Id*. at 2051.)

The State also filed an opposition memorandum. (*Id*. at 2053-63.) The State first noted that SUWA did not have standing. (*Id*. at 2055-56.) Next, the State argued that if SUWA were allowed to intervene it should be limited to the issue of scope, not title, which is all that *Kane County (1)* allowed. (*Id*. at 2056-59.) The State further argued that the changed administration did not alter the adequate representation analysis because there had been no change in the United States' defense of its title. (*Id*. at 2059-61.) Finally, the State argued if allowed to intervene, SUWA's participation should be limited. (*Id*. at 2061-63.)

Kane County also opposed SUWA's fifth motion to intervene. (*Id*. at 2064-87.) First, the County argued SUWA lacked a protectable interest in a title lawsuit.

> Here, the State and County seek to quiet title to the existing widths of the roads, and SUWA has not shown that the State and County intend to "double" the width of any road. Nor do the State and County intend to increase traffic on the roads. As discussed below, this lawsuit will confirm the existing ownership of title to roads and SUWA cannot have an interest or injury in a decision about what already exists under the law.

(*Id*. at 2069.)

Further, the County argued that SUWA lacked standing. (*Id*. at 2069-72.) To the extent the court allowed intervention, the County argued that the district court should limit SUWA's participation to the issue of scope. (*Id*. at 2082-86.) "To avoid continued abuses and to limit the attendant prejudice to everyone else involved, to the extent the Court determines to grant SUWA intervention as-of-right, it should maintain the prudential limitations it has previously placed on SUWA's involvement." (*Id*. at 2086.)

On February 3, 2021 the district court allowed supplemental briefing on the fifth intervention motion. (*Id*. Vol. I at 77.) SUWA filed a supplemental brief on February 25, 2021 that mirrored its earlier arguments. (*Id*. Vol. VIII at 2117-2129.)

Similarly, the State and County filed a joint supplemental opposition, wherein they argued that (1) SUWA lacks both Article III

and prudential standing (*id.* at 2149 n.5); (2) the United States adequately represents SUWA's interests as to both title and scope (*id.* at 2149-65); and (3) any participation by SUWA should be limited to the issue of scope (*id.* at 2167-69).

The United States also submitted a supplemental memorandum (*id.* at 2183-88), which noted that its position remained the same—that "SUWA's right intervene is limited to questions of scope." (*Id.* at 2184.)

VI. The District Court's Order Denying SUWA's Fifth Intervention Motion.

On June 6, 2022 the district court denied SUWA's Fifth Motion to Intervene as of Right. (Order, Add. A; Aplt. App. Vol. VIII at 2290-2343.) Relating to standing, the district court found that, pursuant to this Court's *Kane County (1)* decision, and as long as SUWA "does not seek relief different from the United States," SUWA has piggyback and Article III standing. (*Id.* at 2295, 2298.) However, the district court found that SUWA lacks prudential standing because "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." (*Id.* at 2299.) The district court concluded, though, that it was unclear "what the interplay is between piggyback standing and prudential standing"

but that it did not need to decide the issue because it would not "not alter the outcome of SUWA's motion to intervene." (*Id*. at 2300.)

Relating to Fed. R. Civ. P. 24(a)(2) intervention standards, while the district court found the "decoupling of Rule 24 from Rule 19 problematic," "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." (*Id*. at 2312.)

Moving to the adequate representation prong, the district court found the United States adequately represented SUWA's interests. The district court noted that unlike as in *Kane County (1)*, "no additional evidence is being taken on the issue of scope in *Kane County (2)*." (*Id*. at 2313.) And, in an R.S. 2477 action, "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." (*Id*. at 2314.) Thus, "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." (*Id*. at 2315.) "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." (*Id.*) The district court therefore concluded that the United States adequately represents SUWA's interests and denied the motion to intervene. (*Id.*)

VII. SUWA Seeks Interlocutory Appeal.

SUWA thereafter submitted a motion for certification for interlocutory appeal (*id.* at 2344), which the district court granted (*id.* Vol. I at 80). SUWA sought a stay pending appeal from the district court and from this Court, both of which were denied.

SUMMARY OF THE ARGUMENT

This appeal reviews SUWA's fifth motion to intervene. SUWA's fifth motion was the same as the fourth motion, which was the same as the third motion. In other words, SUWA's repetitive and successive motions were, in effect, motions for reconsideration. The question, therefore, is whether the district court abused its discretion in denying SUWA's motion to reconsider.

The district court is now considering post-trial motions, including the United States' motion to dismiss every road in the lawsuit for lack of a dispute as to title or because the statute of limitations has run. In sum, the United States "has not conceded title to a single road and is arguing for the narrowest width it can under the law." (Order, Add. A; Aplt. App. Vol. VIII at 2292.)

Ultimately, the district court will decide whether the United States or the State and County have owned title to the rights-of-way since before 1976. Specifically, the district court will confirm who has owned the rights-of-way since before SUWA[6] even existed. (*Id.* at 2292.) SUWA has no claim to title to the roads and whatever interest SUWA asserts in public lands management will not be decided in this lawsuit. The lawsuit is a narrowly pleaded title suit between landowners and SUWA has no title to claim or defend. Once a federal lawsuit is joined by an intervenor without standing, the lawsuit "ceases to be an Article III case or controversy." *Kane Cnty. v. United States*, 928 F.3d at 897 (2019) (Tymkovich, C.J., dissenting).

[6] This specific reference is to the Southern Utah Wilderness Alliance alone.

At a minimum, SUWA's argument that it must be allowed to intervene fails in the impossible crosscurrents of Article III and the adequate representation prong of intervention: if SUWA wants to pursue relief different than the United States, it must establish its own standing and it has not. If, on the other hand, SUWA seeks the same relief as the United States, its interests are adequately represented.

Additionally, for whatever circumstances lead this Court to believe a past presidential administration created a "new political and legal landscape that did not exist when SUWA moved to intervene a decade ago," that basis no longer exists because President Trump is no longer in office and President Biden restored the Monument. *Kane Cnty. v. United States*, 928 F.3d at 889 (2019).

Nothing prevents SUWA from presenting its environmental concerns as amicus curiae in this, or other proceedings, and that is the role SUWA played in *San Juan County* and the original trial in *Kane County (1)*. Moreover, if the State and County were to seek to widen, upgrade or improve a road, they would have to enter into consultation with the federal land manager and SUWA can protect its environmental

interests in that process. This lawsuit—which seeks only to quiet title—is not the forum to litigate SUWA's environmental claims.

The district court did not abuse its discretion in denying SUWA's ***fifth*** motion to intervene, which was based on the same arguments lost in the third and fourth motions, and this Court should affirm the district court's Order and dismiss this appeal.

ARGUMENT

I. THE RELEVANT STANDARD OF REVIEW IS ABUSE OF DISCRETION.

This Court reviews a district court's denial of a motion for reconsideration for abuse of discretion. *See United States v. Randall*, 666 F.3d 1238, 1241 (10th Cir. 2011). Indeed, "successive motions for intervention in the same case are frequently treated as motions to reconsider." *Kane Cnty. (1),* 928 F.3d at 902 (2019) (Tymkovich, C.J., dissenting). *See also Abeyta v. City of Albuquerque*, 664 F.3d 792, 796 (10th Cir. 2011) (second motion to intervene is motion to reconsider); *Plain v. Murphy Family Farms*, 296 F.3d 975, 978 (10th Cir. 2002) (same); *Whitewood v. Sec'y Pa. Dep't of Health*, 621 F. App'x 141, 144 (3d Cir. 2015) (unpublished) (finding successive motion for intervention

properly treated as motion for reconsideration); *Calvert Fire Ins. Co. v. Environs Dev. Corp.*, 601 F.2d 851, 857 (5th Cir. 1979) (same).

"Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). "It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.*[7]

In *Kane Cnty. (1)*, the divided panel held that de novo review of successive motions to intervene is warranted "when, as here, a proposed intervenor shows that circumstances have changed between the two motions to intervene." *Kane Cnty. (1)*, 928 F.3d at 889. SUWA assumed, without any analysis, that review in this case would be *de novo*. (SUWA

[7] "Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, a nonparty seeking to intervene as of right must establish (1) timeliness, (2) an interest relating to the property or transaction that is the subject of the action, (3) the potential impairment of that interest, and (4) inadequate representation by existing parties." *Kane Cty. (1),* 928 F.3d at 889 (2019). The State and County do not contest timeliness for purposes of this appeal. "[A]t least for initial motions to intervene, we review the district court's rulings on the other three prongs de novo." *Id.*

Br. at 18 ("The Court reviews de novo each Rule 24(a) requirement.").) But SUWA failed to admit the fact that it had requested intervention more than once—indeed it requested intervention five times before this appeal—and it had raised the same arguments in prior motions that it raises now on appeal. SUWA failed to show any changed circumstances between its third, fourth and fifth motions to intervene. Thus, the motion at issue here was a request for reconsideration, which this Court reviews for abuse of discretion.

II. SUWA LACKS ARTICLE III AND PRUDENTIAL OR THIRD-PARTY STANDING.

A. SUWA Lacks Article III Standing Because It Has Failed To Show An Imminent Injury In Fact.

SUWA's assertion of standing is deficient. To seek relief in federal court, a party must show it has standing. *Kane Cnty. (1),* 928 F.3d at 886 (2019). "To make this showing, a party must demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the challenged conduct, and that the injury will likely be redressed by a favorable decision." *Id.* (cleaned up). The 'piggyback standing' rule has been modified such 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." *Id.*

The doctrine also reflects "Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). "Entertaining parties that lack standing effectively disregards the constitutional limits that circumscribe the power of federal courts. This is because an Article III case or controversy joined by an intervenor who lacks standing ceases to be an Article III case or controversy." *Kane Cnty. (1)*, 928 F.3d at 897 (2019) (Tymkovich, C.J., dissenting) (quotations omitted).

SUWA argues that "[t]his 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." (SUWA Br. at 16.) SUWA seems to gloss over Supreme Court precedent, including *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), which requires that "an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." In fact,

SUWA then cites a case decided ***before*** *Town of Chester— San Juan Cnty.*, 503 F.3d at 1172—to claim that "no independent showing of Article III standing is required." (SUWA Br. at 16.) SUWA is wrong.

As then Chief Judge Tymkovich noted in his dissent in *Kane County (1)*, "[t]his circuit has recognized the Supreme Court's abrogation of *San Juan County's* piggyback rule for intervenor standing in several published opinions, regardless of whether the remedy sought is identical." *Id.* at 898 (citing *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017), *United States v. Colo. & E. R.R. Co.*, 882 F.3d 1264, 1269 (10th Cir. 2018)).

This Court should review and clarify the requirements for an intervenor to have piggyback standing. As now asserted by SUWA, it should be a party with piggyback standing because it promises not to seek different relief than the United States. Under that same view, anyone can walk into federal court, pick a side of a dispute, and become a full party upon the promise not to seek additional relief. "[I]t is hard to see how SUWA (or its off-road vehicle user counterparts, who are waiting in the wings to intervene on the same legal theory that supports SUWA's intervention, . . . can be considered a party to the

question of what real property the United States owns." *San Juan Cnty.*, 503 F.3d 1210. (McConnell, J., concurring).

Despite SUWA's attempts to the contrary, "Article III standing to litigate cannot be waived." *Kane Cnty. v. United States*, 333 F.R.D. 225, 231 (D. Utah 2019). While SUWA "briefly addresses" the standing issue, such an important jurisdictional issue cannot be so easily dismissed.[8] The district court found that "as long as SUWA does not seek relief different from the United States," SUWA has piggyback standing. (Order, Add. A; Aplt. App. Vol. VIII at 2295.) The district court also found, pursuant to this Court's decision in *Kane County (1),* that SUWA has constitutional standing. (*Id.* at 2298.)

The State and County do not agree. In *Kane County (1)*, the divided panel held that SUWA had established its own constitutional

[8] Interestingly, SUWA admits here that "SUWA is seeking the same relief as the United States." (SUWA Br. at 16.) As Kane County discusses below, that means that the United States can adequately represent its interests. "If SUWA seeks identical relief to the United States—that is, federal retention of the maximum amount of property—then the United States provides adequate representation of SUWA's interests." *Kane Cnty. (1),* 928 F.3d at 898 (2019) (Tymkovich, C.J., dissenting).

standing due to "an imminent injury." *Kane Cnty. (1)*, 928 F.3d at 888 (2019).

> Kane County and the State of Utah seek to double the width of Swallow Park and North Swag roads, which are both dirt roads, and to more than double the width of Skutumpah Road. Wider roads will likely require realignments or improvements, such as grading or paving. Such widening and improvement of the roads in a scenic area would almost inevitably increase traffic, diminishing the enjoyment of the nearby natural wilderness.

Id.

SUWA's statements to this Court, which were relied on to find standing, were false. The State and County had no such intent and, in fact, the district court has chastised SUWA for misstating "the width issue." (Order, Add. A; Aplt. App. Vol. VIII at 2335.) "Here, the State and County seek to quiet title to the existing widths of the roads, and SUWA has not shown that the State and County intend to 'double' the width of any road. Nor do the State and County intend to increase traffic on the roads." (Aplt. App. Vol. VIII at 2069.) *See also* I., *supra* (discussing required consultation prior to any widening), and III.B., *infra* (discussing SUWA's mischaracterizations).

SUWA cannot show any injury in fact when this quiet title suit will merely confirm an existing title and will not change the character of the roads. Thus, SUWA's motion fails for lack of standing.

B. SUWA Does Not Have Prudential or Third-Party Standing.

The district court correctly found that SUWA does not have prudential standing. (Order, Add. A; Aplt. App. Vol. VIII at 2298-2300.) "[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). As in *Kane County (1)*, "SUWA has no special relationship with the United States and there is no barrier preventing the United States from asserting its right to title." *Kane Cnty. (1)*, 928 F.3d at 900 (2019) (Tymkovich, C.J., dissenting). The district court similarly found that "there is no ground to conclude that the United States is hindered in its ability to protect its own interest." (Order, Add. A; Aplt. App. Vol. VIII at 2300.)

Similarly, in *Wilderness Society v. Kane Cnty.*, 632 F.3d 1162 (10th Cir. 2011) (en banc), this Court held SUWA lacked prudential standing "to vindicate the property rights of the federal government." *Id.* at 1165. In that case, SUWA also "rest[ed] its claims on the federal

government's property rights" and failed to "assert a valid right to relief of its own." *Id*. at 1170. As the dissent in *Wilderness Society* recognized, if the statutory cause of action properly belonged to the United States, SUWA would not have standing. *See id*. at 1189-90 (Lucero, J., dissenting). In fact, environmental injury "doesn't necessarily demonstrate … prudential standing to bring [] constitutional claims." *VR Acquisitions, LLC v. Wasatch Cnty*., 853 F.3d 1142, 1147 (10th Cir. 2017). *See also Hornish v. King Cnty*., 899 F.3d 680, 692 (9th Cir. 2018) (finding a party that possesses "no property interests" in disputed land "cannot allege any injury to such interests, and therefore lack[s] standing" in a quiet title action).

SUWA has already admitted it seeks the same relief as the United States. (SUWA Br. at 16 ("Because SUWA is seeking the same relief as the United States, standing is not required.").) Very literally, SUWA has asserted no legal rights of its own. Further, SUWA "does not possess a cause of action under the Quiet Title Act because it does not assert title to the roads. *See* 28 U.S.C. § 2409a(a), (d). The cause of action properly belongs to the State and County "because they *do* assert title." *Kane Cnty. (1)*, 928 F.3d at 901 (2019) (Tymkovich, C.J.,

dissenting) (emphasis in original). Indeed, the district court found that SUWA lacks prudential standing because "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." (*Id.* at 2299.)

Despite the district court's finding that SUWA lacked prudential standing, SUWA makes no argument related to prudential standing and has waived the issue. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) (issues not addressed in opening brief are deemed waived).

III. SUWA CANNOT INTERVENE BECAUSE IT LACKS A LEGAL INTEREST THAT MAY BE IMPAIRED OR IMPEDED IN THIS LAWSUIT.

Even if SUWA has standing, SUWA cannot satisfy the elements required for intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2). This is true under either standard of review—abuse of discretion, which the State and County argue is appropriate, or *de novo* review, which SUWA assumes is appropriate.

Federal Rule of Civil Procedure 24(a)(2) permits intervention by a party that "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."[9]

Although the district court expressed concern relating to the "interest" prong for intervention as of right—noting "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" (Order, Add. A; Aplt. App. Vol. VIII. at 2312), the court "nevertheless assume[d] that SUWA has satisfied Rule 24(a)'s 'interest' prong" (*id.*).

The State and County disagree. (Aplt. App. Vol. VII at 2068-69; Supp. App. Vol. I at 206-66.) SUWA lacks a legal interest in this title suit and fails to show that the United States will not adequately defend the only interest in the lawsuit – title.

[9] Additionally, as discussed below, the first rule of civil procedure is that the rules "should 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. Here, the State and County have the right to pursue their title claims to a "speedy and inexpensive determination." *Id*. SUWA's repetitive and expensive intervention motions makes Rule 1 an impossibility.

A. *Kane County (1)* Intervention Did Not Settle The Law On Intervention.

As an initial matter, contrary to SUWA's contention otherwise, *Kane County (1)* does not mandate that courts in this circuit allow SUWA—and every other environmental, recreational or other special interest group for that matter—to intervene in every road case in which it seeks to intervene. Each case has different facts, different roads, and different circumstances. While "[i]ntervention law has been inconsistently interpreted by the circuits," (Order, Add. A; Aplt. App. Vol. VIII at 2309) what is clear first and foremost in this circuit is that the inquiry is "a highly fact-specific determination." *San Juan Cnty.*, 503 F.3d at 1197 (quotation omitted).[10] In each case, a court must apply the facts to the elements set out in Rule 24(a)(2). Otherwise, no rule would be required.

Second, as the district court found, this Court sitting en banc in *San Juan County* determined that SUWA "does not have a *per se* right to intervene in R.S. 2477 cases." (Order, Add. A; Aplt. App. Vol. VIII at

[10] The fact-specific nature of the analysis is further support for deference to the district court in deciding whether and how intervention should be allowed, and an abuse of discretion standard of review.

2293.) Under this Court's precedent, a panel—such as in *Kane County (1)*—may not overrule another panel decision or en banc ruling. *See 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 judgment of another panel of this court absent en banc reconsideration").

Thus, the intervention allowed in *Kane County (1)* does not automatically apply in *Kane County (2)*, and it is demonstrably wrong for SUWA to argue otherwise in light of this Court's precedent. This Court has denied SUWA's intervention in R.S. 2477 quiet title suits three out of four times, including once en banc in *San Juan County*. In each of those instances, the then-existing claims involved title claims which are the existence, length and breadth of the roads. Title and scope are "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." (Order, Add. A; Aplt. App. Vol. VIII at 2304-05.)

At a bare minimum, the divided panel decision in *Kane County (1)*, which found that a change in presidential administrations rebutted the

presumption of adequate representation, no longer supports intervention in this case. *See Kane Cnty. (1)*, 928 F.3d at 896-97 (2019) (finding the new administration may be more inclined to settle). Donald Trump is no longer the President of the United States. President Biden restored the Monument boundaries (*see id*. at 885) and there is again a changed administration. Thus, the stated factual basis justifying intervention in *Kane County (1)* no longer exists. Accordingly, the district court properly followed the three other Tenth Circuit decisions (including en banc) and denied SUWA's intervention in 2022 during the Biden administration. (Order, Add. A; Aplt. App. Vol. VIII at 2316 (noting that SUWA had previously raised this "changed administration" argument in a prior motion to intervene).)

Finally, as further proof that *Kane County (1)* is not the settled law on intervention in this circuit, SUWA itself now requests that Tenth Circuit case law be changed to allow SUWA to litigate ***title*** so as not to "also imped[e] SUWA's ability to protect its interests with respect to scope." (SUWA Br. at 34.)

SUWA has, and can continue to, advocate for its interests as an amicus curiae party, which it has done in every case where it was

denied intervention. Yet, even though the divided panel in *Kane County (1)* allowed SUWA to intervene only as to scope, SUWA now claims its successful litigation efforts in the past in fact were not successful and asks that it be allowed to "intervene as of right in this case, both as to title and scope." (SUWA Br. at 2.)

SUWA has no title at issue in the lawsuit and any interest it might claim in the proceedings is not a legal interest but a philosophical one that cannot be adjudicated by the district court. Indeed, SUWA is a stranger to title with "no legal interest at issue in the dispute." *Kane Cnty. (1)*, 950 F.3d at 1330 (2020) (Tymkovich, C.J., dissenting) (petition for rehearing en banc).

Notably, even if the Court were to find that SUWA has standing and has an environmental interest, that would still be "an insufficient basis to find that the proposed intervenors have a legally protectable interest *in this case*." *Cal. Steel Indus. v. United States*, 48 F.4th 1336, 1344 (Fed. Cir. 2022) (emphasis added). In *California Steel Industries*, several steel importers filed an Administrative Procedure Act ("APA") lawsuit to be excluded from steel import tariffs imposed by the Department of Commerce. *Id*. at 1339. Several domestic steel producers

moved to intervene as party defendants to defend Commerce's imposition of tariffs on imported steel. *Id.* at 1339-40. The domestic steel producers, who had objected to the importers' request to be excluded from the tariff during the departmental proceedings, sought to intervene as of right upon their "claimed interest in the transactions at issue." *Id.* at 1339 (citing U.S. C.I.T. Rule 24 (a)(2)).

Although the court found that the proposed defendant-intervenor domestic steel producers had established "piggyback standing," they "must still identify a legally protectable interest to qualify as intervenors under Rule 24(a)(2)." *Id.* at 1343. The domestic steel producers claimed an interest in Commerce's action because of their "administrative participation, direct economic stake, and position as intended beneficiaries of the President's ad valorem tariff." *Id.* at 1344 (quotations omitted).

In denying intervention as of right, the court noted that the domestic steel producers were free to provide comments to Commerce before it made its tariff decision, just like anyone else, but that participation "creates no protected legal interests." *Id.* (citations omitted). Moreover, alleged economic interests were insufficient. *Id.*

With no legally protectable interest in the proceeding, the defendant-intervenors were properly denied intervention and "arguments about the practicable impairment of their interests have no merit." *Id.*

Here, regardless of whether SUWA did, or will, participate during land use planning (just like anyone else), that does not give SUWA an interest in title. A pre-1976 title is the only issue to be decided in this title suit and even if the Court were to assume standing, SUWA lacks an interest in the lawsuit.

B. Unlike This Court's Finding in *San Juan County*, SUWA Lacks a Legal Environmental Interest At Risk of Injury in This Lawsuit.

An R.S. 2477 quiet title suit has always involved the "narrow" issue of the "existence or non-existence of a right-of-way and its length and its breadth [scope]." *San Juan Cnty. v. United States*, 503 F.3d 1163, 1206 (10th Cir. 2007) (quotations omitted).

This Court's fact-specific finding in *San Juan County* that SUWA's "environmental concern is a legally protectable interest" is distinguishable from the facts in this lawsuit. *San Juan Cnty.*, 503 F.3d at 1199. In 1995, SUWA sued the National Park Service ("NPS") under the APA to challenge final agency action adopted in the Backcountry

Management Plan ("BMP") for Canyonlands National Park. *See S. Utah Wilderness All. v. Dabney*, 222 F.3d 819, 822 (10th Cir. 2000). During the district court proceedings, SUWA obtained an injunction that caused NPS to install a gate on the Salt Creek road to prohibit further motor vehicle travel beyond Peekaboo Spring. *Id*.

The section of the Salt Creek road blocked by the gate included a unique freshwater stream, flowing in the desert, and riparian areas. Under its Organic Act and the Canyonlands enabling act, NPS was specifically prohibited from authorizing "activities within national parks that permanently impair unique park resources." *S. Utah Wilderness All. v. Dabney*, 222 F.3d at 825 (citation omitted). The district court's injunction gating the Salt Creek Road issued upon a finding that the evidence showed that "'the riparian areas in Salt Creek Canyon are unique and that the effects of vehicular traffic beyond Peekaboo Spring are inherently and fundamentally inimical to their continued existence,' [and] the district court held that the BMP was inconsistent with the 'clear legislative directive' of Congress." *S. Utah Wilderness All.*, 222 F.3d at 825-26 (citations omitted). This Court vacated the injunction imposing the gate and remanded for further analysis. *Id*. at 830.

On remand to the district court, the NPS, which had not appealed the district court injunction (222 F.3d at 822), chose to leave the gate on the Salt Creek Road. After further legal proceedings before the district court, San Juan County filed suit under the Quiet Title Act. San Juan County additionally filed a claim for declaratory relief seeking a "declaration that a system of gates put in place by the NPS deprives the County of its use of the right-of-way for vehicular travel." *San Juan Cty.*, 503 F.3d at 1170. This Court did not further analyze the claim for declaratory relief but noted that it "appears to go beyond the issue of title." *Id.* at 1207.

Seven of the 13 judges participating in the en banc decision agreed that it was "indisputable that SUWA's environmental concern is a legally protectable interest. After all, it was this concern that gave it standing to bring its litigation against the NPS regarding Salt Creek Road." *Id.* at 1199. However, this Court held that SUWA did not have to establish its own standing to intervene (*id.* at 1167), and six of the 13 judges dissented from the "conclusion that SUWA has a legally protectable interest in this quiet title action." *Id.* at 1207.

The federal law, facts and circumstances in this lawsuit are not at all like those in *San Juan County*. For whatever interest SUWA may claim in wilderness, wilderness study areas, public lands, or the undefined "environment," those interests are governed by the controlling law that public lands exist "subject to valid existing rights." *Kane Cnty. v. United States*, 772 F.3d at 1217 (2014) (citations omitted). More importantly, none of SUWA's claimed interests will be considered or impaired by the title decision to issue from the district court. (Order, Add. A; Aplt. App. Vol. VIII at 2303.) SUWA has failed to identify any law showing it has a legal interest in this title suit that is not wholly subject to "valid existing rights" like R.S. 2477 rights-of-way.

SUWA's and the district court's statement that "this case involves some closed roads" needs clarification. (*Id.* at 2311; SUWA Br. at 4 ("presently closed").) The specific federal lands at issue in Kane County are all managed "subject to valid existing rights," which include R.S. 2477 rights-of-way. (Aplt. App. Vol. I at 166 (FLPMA); 176 (Monument); 182-83 (BLM Field Office); 185-86 (Glen Canyon NRA).) *See also Kane Cnty. (1),* 772 F.3d at 1217 (2014). While the Monument was created in 1996 "subject to valid existing rights" (*id.* at 176), the BLM ostensibly

"closed" roads in the Monument with this sophism: "Any route not shown on Map 2 is considered closed, subject to valid existing rights." (Order, Add. A; Aplt. App. Vol. VIII at 2312-2315.) The BLM later used similar language to "close" roads on lands in the Kanab Field Office.

Thus, any road "considered closed" in this lawsuit is not closed if there is a valid existing R.S. 2477 right-of-way, which is quite different from the Salt Creek Road in *San Juan County* that was litigated, gated and specifically closed to protect riparian lands in a National Park.

The Court should deny SUWA's motion to intervene for lack of a protectable interest in this title suit.

C. The United States Already Adequately Represents Title and SUWA Can Have No Other Interest In This Quiet Title Suit.

"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)). In fact, this Court presumes adequate representation "when the objective of the applicant for intervention is identical to that of one of the parties." *San Juan Cty.*, 503 F.3d at 1204 (quotation omitted).

This presumption applies "when the government is a party pursuing a single objective," as here. *Id.*

The United States already adequately represents SUWA's interest in this lawsuit. In fact, SUWA admitted as much when it claimed it was seeking the same relief as the United States. (SUWA Br. at 16 ("SUWA is seeking ***the same relief as the United States***." emphasis added).) If SUWA seeks identical relief, then the United States can provide adequate representation for any interest SUWA might have.

In fact, the United States' and SUWA's interests ***are*** identical in this case—as opposed to *Kane County (1)*—because in this case, where *title* is in question, SUWA has no interests independent from the United States. This lawsuit will decide the single issue of the existing ownership of title and environmental factors do not come into play. (Order, Add. A; Aplt. App. Vol. VIII at 2312-2315.) Given that environmental factors do not come into play, the "representation is adequate [because] 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) (cleaned up). As the district court noted, "the United States is not litigating to

protect the general public's rights. It is litigating to protect its own exclusive title to property." (*Id.* at 2315.)

The district court found specific facts that demonstrate that the United States is adequately defending any interest SUWA might claim in the suit. On the extensive record, after a three-week trial, and on review of the post-trial briefing, the district court "is aware of what is now before the court." (*Id.* at 2313.) In "none of the foregoing were [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." (*Id.*) "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)." (*Id.*)

The district court's factual observations regarding the United States' adequate representation are due substantial deference and should be reviewed for an abuse of discretion. "[S]uccessive motions for intervention in the same case are frequently treated as motions to reconsider." *Kane Cnty. (1),* 928 F.3d at 902 (2019) (Tymkovich, C.J., dissenting). As the district court found, the facts indicate that the United States already adequately represents SUWA's interests.

D. Intervention Decisions in APA Lawsuits Are Generally Inapposite to This Quiet Title Lawsuit.

SUWA takes issue with the district court's finding that the "federal government is not always legally obligated to consider a broader spectrum of views." (SUWA Br. at 23, citing Order (Aplt. App. Vol. VIII at 2314).) Indeed, Judge Tymkovich noted the difference in APA intervention decisions as related to adequate representation prong of intervention. "Unlike APA challenges concerning land use like those raised by the majority, a dispute over land ownership does not call upon the government to consider the wide array of interests the majority suggests are brought to bear and which subsequent administrations might weigh differently from prior ones. *Kane Cnty.*, 950 F.3d at 1335 (2020) (Tymkovich, C.J., dissenting). "[T]he government's defense of its title in a quiet title action does not implicate a similarly broad array of interests." *Id*. at 1336.

In an APA lawsuit, the range of statutes, decisions, and interests often involves "a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *Kane Cty. (1)*, 928 F.3d at 893 (2019) (citation omitted). The United States' interests

in a quiet title action, on the other hand, are necessarily limited to protecting its exclusive title to property.

IV. SUWA'S LITIGATION CONDUCT DEMONSTRATES THAT IT SHOULD NOT APPEAR AS A PARTY BUT AS AN AMICUS CURIAE.

In denying intervention on grounds of adequate representation in *San Juan County*, this Court held that the "denial does not forever foreclose SUWA from intervention. 503 F.3d at 1207. "If developments after the original application for intervention undermine the presumption that the Federal Defendants will adequately represent SUWA's interest, the matter may be revisited." *Id*.

When SUWA was granted limited permissive intervention in this lawsuit, it believed the Court's holding was a challenge: SUWA needed to prove that it could litigate more than the United States.

Stepping up to the task, SUWA deployed "at least 18 lawyers from national and international firms, as well as experienced local attorneys who [were] retained and [would] apply the resources necessary to properly defend this case." (Order, Add. A; Aplt. App. Vol. VIII at 2321.) In this regard, SUWA failed to heed this Court's admonishment that "too many cooks spoil the broth. To oppose another cook in the kitchen

is not to oppose the other cook's desire for a superb meal." *San Juan Cty.*, 503 F.3d at 1206.

The documented history of SUWA's excessive litigation tactics is aptly recounted in the district court's Memorandum Decision and Order Re SUWA's Participation dated September 5, 2019 (denying SUWA's fourth motion to intervene). (Aplt. App. Vol. VII at 1819-56.) After describing the excessive filings, delays and other abuses, the district court directed SUWA to participate only "through the United States." (*Id.* at 1854.) SUWA now complains about the restrictions imposed upon its role in the suit. (*See, e.g.*, SUWA Br. at 30-31.)

Long ago this Court recognized that R.S. 2477 claims involve "matters no one had reason to document at the time." *S. Utah Wilderness All.*, 425 F.3d at 742. The roads "were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority." *Id.* at 741.

In the end, SUWA actually had nothing to contribute or add to the development of the evidence in this lawsuit. Nevertheless, it

attempted to turn "over every rock" to find something. (Aplt. App. Vol. VII at 1838, Vol VI at1733.) More egregiously, SUWA made false representations about the existence of evidence and whether discovery had been produced. (*Id.* Vol. VII at 1476-77.)

With regard to SUWA's complaint that it had retained its own experts that were not allowed to testify at trial (SUWA Br. at 30-31), the simple fact is that their testimony would have been excluded by a motion in limine. Mr. Hughes' and Ms. Greenwald's "proposed testimony is entirely duplicative of the expert testimony provided by [the United States' three experts] Messrs. Baker, Hickerson and Webb." (*Id.* VIII at 2086, n.6.)

The fact that SUWA multiplied the underlying proceedings but had nothing to add shows that SUWA is not a proper party. "Further, the proposed intervenors must show that their participation could add some material aspect beyond what is already present. And they make no such demonstration here." *Cal. Steel Indus.*, 48 F.4th at 1344. (citations and quotations omitted). "The proposed intervenors admit that they seek the same relief as the government" and their environmental interests "are irrelevant." *Id.* "Without more, the

proposed intervenors fail to show that their participation could add any material aspect beyond what is already present." *Id.* at 1345.

Even an "intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment. Thus, the district court was authorized to limit SUWA's conduct, and it was not error to deny intervention as of right.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's Memorandum Decision and Order Denying SUWA's Fifth Motion to Intervene as of Right and dismiss the appeal.

STATEMENT REGARDING ORAL ARGUMENT

As shown herein, and the briefing submitted to the Court, there are numerous substantive issues to be resolved in this appeal. The issues are factually and legally significant and complex. Accordingly, oral argument is requested to allow the Court and the parties to further discuss the issues presented in this appeal.

RESPECTFULLY SUBMITTED this 6th day of February 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Century Schoolbook font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,511 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b).

DATED February 6, 2023

/s/ Shawn Welch

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to this filing:

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DATED February 6, 2023

/s/ Shawn Welch

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via the appellate CM/ECF system.

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/s/ Shawn Welch

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