No. 22-4087

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KANE COUNTY, UTAH, *et al.*
Plaintiffs/Appellees,

v.

UNITED STATES OF AMERICA,
Defendant/Appellee,

and

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,
Applicant-Defendant-Intervenors-Appellants.

Appeal from the United States District Court for the District of Utah
No. 2:10-cv-01073 (Hon. Clark Waddoups)

ANSWERING BRIEF FOR THE UNITED STATES

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Oral argument is requested.

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PRIOR OR RELATED APPEALS

This Court previously considered issues similar to those presented in this appeal in a case involving the same parties but different underlying title disputes, *Kane County v. United States*, Case No. 2:08-cv-315 (D. Utah 2008). In that case, Appellants Southern Utah Wilderness Alliance et al. appealed the district court's denial of their original motion for intervention in Case No. 09-4087. This Court upheld the district court's order denying intervention in *Kane County v. United States*, 597 F.3d 1129 (10th Cir. 2010). The United States, Kane County, and the State of Utah subsequently appealed the district court's orders on the merits of that case in Case Nos. 13-4108, 13-4109, and 13-4110. This Court reversed the district court's judgment, in part, in *Kane County v. United States*, 772 F.3d 1205 (10th Cir. 2014). Following remand, Appellants Southern Utah Wilderness Alliance et al. appealed the district court's denial of their renewed motion for intervention in Case No. 18-4122. This Court reversed the district court's order denying intervention in *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).

Appellants Southern Utah Wilderness Alliance et al. also sought a writ of mandamus regarding an earlier motion to intervene before the district court in the present case, seeking reassignment of the case and reconsideration of their intervention request, in *In re Southern Utah Wilderness Alliance*, Case No. 19-4134. This Court denied the request for writ of mandamus. (Supp. App. at 60–67 (Order (October 25, 2019))).

GLOSSARY

Kane 1 (2010)	*Kane County v. United States*, 597 F.3d 1129 (10th Cir. 2010)
Kane 1 (2014)	*Kane County v. United States*, 772 F.3d 1205 (10th Cir. 2014)
Kane 1 (2019)	*Kane County v. United States*, 928 F.3d 877 (10th Cir. 2019)
R.S. 2477	Revised Statutes 2477
SUWA	collectively, Southern Utah Wilderness Alliance, the Wilderness Society, the Sierra Club, and the Grand Canyon Trust

INTRODUCTION

Kane County and the State of Utah sued the United States under the Quiet Title Act claiming title to rights-of-way for certain roads. Resolution of this title dispute turns on historic use of the claimed roads by the public prior to 1976. Thus, this case does not involve questions of federal land management or administrative policymaking that might involve broader and competing interests. Rather, the United States is simply defending its title in traditional, fact-specific litigation based on the state of affairs almost half a century ago.

Southern Utah Wilderness Alliance, the Wilderness Society, the Sierra Club, and the Grand Canyon Trust (collectively, SUWA) appeal the denial of their motion to intervene as of right as defendants in this case under Federal Rule of Civil Procedure 24 (Rule 24), citing their environmental interests in preserving wilderness in the area of the claimed roads. But while SUWA may have concerns about the management of public lands and the preservation of wilderness, this case is not about those issues—this is a quiet-title action that will only consider disputed historical facts and decide the existence and scope of any rights-of-way. SUWA's environmental concerns are simply beside

the point to the resolution of these issues concerning title in real property.

SUWA therefore lacks the requisite "interest relating to the property" to qualify for intervention as of right under Rule 24(a)(2). The "property" at issue in this case is *title*, in which SUWA can claim no interests. And SUWA's environmental concerns about the general area through which a right-of-way might pass are both categorically distinct from the question of title at issue in this quiet-title action and too attenuated and contingent to support a right to intervene as a party. Furthermore, given that any future improvements to the claimed roads which could significantly affect the surrounding lands would require additional consultation with the federal government, resolution of title here will not, as a practical matter, meaningfully impair SUWA's ability to protect those interests. In any event, even if SUWA could assert a judicially cognizable or legally protectable interest in this title dispute, the United States and SUWA share an identical objective in this litigation—defending the United States' title and minimizing any rights-of-way across federal lands—and the United States therefore adequately represents SUWA's interests with respect to the sole issue

in this case. For these reasons, as further explained below, the district court's denial of intervention as of right should be affirmed.

The United States has petitioned for initial hearing of this appeal en banc. Both the United States and SUWA *agree* that the distinctions drawn in this Court's decisions on intervention are unsound but disagree on how that inconsistency should be resolved. Indeed, SUWA urges the Court to disregard a controlling precedent to achieve broader intervention than this Court has allowed. If the United States' en banc petition is denied, given that the United States is aware of no material difference from the *Kane 1* case, the panel's consideration of this appeal will be controlled by existing panel precedent. Specifically, under the Court's prior case law, the Court is bound (1) to affirm the denial of SUWA's motion to intervene as of right with respect to the determination of title in any R.S. 2477 rights-of-way, and (2) to reverse and grant SUWA's motion to intervene with respect to the issue of the scope of any R.S. 2477 rights-of-way for which the district court quiets title in favor of the County and State. The United States presents its arguments here to explain why SUWA does not have a right to intervene at all, which necessarily defeats SUWA's contention on this

appeal that—contrary to this Circuit's precedent—it should be entitled to intervene even on the question of the existence of a right-of-way. That presentation will also serve to set those arguments out for consideration by the full Court if it grants initial hearing en banc and to preserve them for further review.

STATEMENT OF JURISDICTION

The district court has subject matter jurisdiction over this case because Kane County's claims against the United States arise under the Quiet Title Act, 28 U.S.C. § 2409a(a), and 28 U.S.C. § 1346(f) grants exclusive jurisdiction to the district courts to adjudicate such claims. Tenth Circuit law is unsettled on whether a prospective intervenor such as SUWA must demonstrate independent Article III standing to intervene or can "piggyback" on the standing of the existing parties. *Compare Kane County, Utah v. United States*, 928 F.3d 877, 886–887 (10th Cir. 2019) (holding that intervenor need not demonstrate independent standing), *with Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 912 (10th Cir. 2017) ("Article III's requirements apply to all intervenors, whether they intervene to assert a claim or defend an interest."). At the minimum, SUWA must demonstrate that it

independently "meet[s] the requirements of Article III" if it pursues claims, defenses, or relief not sought by the United States. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1647–48 (2017); *see also United States v. Colo. & E. R.R. Co.*, 882 F.3d 1264, 1269 (10th Cir. 2018). SUWA has not shown independent Article III standing.

On June 6, 2022, the district court denied SUWA's most recent motion to intervene. (App. Vol. VIII at 2290–2343.) On July 11, 2022, the district court granted SUWA's motion to certify the issue for interlocutory appeal. (App. Vol. I at 80 (ECF 732).) On September 13, 2022, this Court accepted SUWA's petition to appeal under 28 U.S.C. § 1292(b). (App. Vol. VIII at 2353–54.) Consequently,, this court has appellate jurisdiction under section 1292(b).

STATEMENT OF THE ISSUES

1. Whether, in an action to quiet title to claimed rights-of-way on federal land based on historical use of the rights-of-way prior to 1976, environmental groups with concerns over future management of the federal land but no claim of title or direct interest in the disputed property have a sufficient "interest relating to the property . . . which is the subject of the action" to intervene as of right under Fed. R. Civ. P. 24(a)(2).

2. Whether resolution of a quiet-title action regarding claimed rights-of-way on federal land could impede or impair the ability of environmental groups to protect their environmental interests for purposes of Fed. R. Civ. P. 24(a)(2), where further improvements of any resulting right-of-way would require additional federal consultation.

3. Whether, in an action to quiet title to claimed rights-of-way on federal land, the interests of environmental groups are adequately represented by the United States for purposes of Fed. R. Civ. P. 24(a)(2), where the United States and the proposed intervenors share the identical litigation objective of preserving the United States' title and minimizing any rights-of-way across federal lands.

PERTINENT STATUTES

All pertinent statutes are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Statutory background

1. Federal Rule of Civil Procedure 24

The Federal Rules of Civil Procedure provide that, upon timely application, an applicant may intervene as of right if it

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Any motion to intervene must be accompanied by "a pleading that sets out the claim or defense for which intervention is sought." *Id.* 24(c).

2. The Quiet Title Act

The Quiet Title Act provides a limited waiver of sovereign immunity under which the "United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). A plaintiff must "set forth with particularity the

nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." *Id.* § 2409a(d). A plaintiff bringing a quiet-title action against the United States under the Quiet Title Act has "the burden of establishing their title to the disputed interest." *Amoco Production Co. v. United States*, 619 F.2d 1383, 1389 (10th Cir. 1980). Where Quiet Title Act jurisdiction lies, the court may adjudicate title disputes between plaintiff and the United States. *See Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993).

3. R.S. 2477

In 1866, as a means of providing public access across unreserved public domain lands, Congress provided that the "right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (formerly codified at 43 U.S.C. § 932), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 706(a), 90 Stat. 2743, 2793. This statute is commonly known as "R.S. 2477" based on the statute's codification in the Revised Statutes of the United

States, the precursor to the United States Code. In 1976, Congress repealed R.S. 2477, but preserved "any valid" right-of-way "existing on the date of approval of this Act." Pub. L. No. 94-579, §§ 701(a), 706(a), 90 Stat. at 2786, 2793.

> Unlike rights established under other federal land grant statutes,
>
> the establishment of R.S. 2477 rights of way required no 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. . . . R.S. 2477 was a standing offer of a free right of way over the public domain, and the grant may be accepted without formal action by public authorities.

S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005) (internal quotation marks and citations omitted); *see also id.* at 753 ("Title to an R.S. 2477 right of way . . . passes without any procedural formalities and without any agency involvement."). R.S. 2477 rights-of-way over federal land remain subject to reasonable regulation by relevant federal land management agencies. *See id.* at 746–49. The entity claiming an R.S. 2477 right-of-way against the federal government bears the burden of proving its right-of-way. *Id.* at 768–69.

B. Factual and procedural background

There are about 1.6 million acres of federal public land in Kane County, Utah (Kane County), including the Grand Staircase-Escalante National Monument, which by itself covers more than a million acres. In 2008, Kane County sued the United States to quiet title to fifteen roads within Kane County that cross federal public land (*Kane 1*). Kane County filed the present action in 2010 while its prior case was proceeding, seeking to quiet title to 64 additional R.S. 2477 rights-of-way (*Kane 2*). By 2012, Kane and other Utah counties, together with the State of Utah, had collectively filed more than twenty cases alleging claims to approximately 12,000 roads as public roads that were established under R.S. 2477.

1. The *Kane 1* proceedings.

This Court confronted these intervention issues in *Kane 1*, a case involving the same parties, but different underlying property. After Kane County brought R.S. 2477 claims against the United States, SUWA moved to intervene as of right, and the district court denied that motion. This Court affirmed the denial of intervention, finding that the United States adequately represented SUWA's interests. *Kane County*

v. United States, 597 F.3d 1129, 1133–36 (10th Cir. 2010) (*Kane 1 (2010)*).

After a bench trial, the district court held that Kane County and the State of Utah had proved their claims to twelve rights-of-way, and it determined the scope of those rights-of-way. The United States appealed the district court's decision regarding the scope of the rights-of-way, and this Court reversed in part, remanding the question of the proper scope of three rights-of-way. *Kane County v. United States*, 772 F.3d 1205 (10th Cir. 2014) (*Kane 1 (2014)*). The Tenth Circuit denied SUWA's application to intervene directly in that appeal. (Supp. App. at 2–3.)

SUWA renewed its motion to intervene in the district court in 2017 in connection with the further proceedings reconsidering the scope of the three rights-of-way. Treating that motion as a motion for reconsideration, the district court denied intervention, and SUWA appealed. On June 25, 2019, a divided panel of this Court reversed, holding that SUWA had a right to intervene as a party with respect to the scope of the three rights-of-way, even though this Court had previously affirmed denial of SUWA's motion to intervene in the same

case. *Kane County v. United States*, 928 F.3d 877 (10th Cir. 2019) (*Kane 1 (2019)*). The majority reasoned that issues of the scope of the rights-of-way differed from the question of title, and that SUWA had a right to intervene as to issues of scope. *Id.* at 893–97. Then-Chief Judge Tymkovich dissented. *Id.* at 897–906. The United States and Kane County petitioned for rehearing en banc, and the Court split evenly—five judges voted to deny rehearing en banc, and five judges dissented from that denial (with two judges recused and one seat vacant). *Kane County v. United States*, 950 F.3d 1323 (10th Cir. 2020). The five dissenting judges declared the panel's decision "inconsistent with . . . our precedent on the right to intervention." *Id.* at 1336–37.

2. The *Kane 2* proceedings

In 2010, Kane County filed a second quiet-title action claiming 64 additional rights-of-way under R.S. 2477. (App. Vol. I at 83–158 (SUWA Amended Complaint).). The State of Utah intervened in support of Kane County's claims. (App. Vol. II at 362–429 (Utah Complaint as Intervenor).) Utah and Kane County filed two additional complaints in 2011 and 2012 claiming another 711 rights-of-way under R.S. 2477. The district court consolidated and merged these three cases

on April 18, 2013.[1] (App. Vol. I at 15–16 (ECF 91).) Since 2011, the State of Utah and other Utah counties have filed over sixteen other complaints under the Quiet Title Act collectively claiming more than 12,000 rights-of-way under R.S. 2477. The judge handling the Kane County cases is also managing these additional cases under a separate case management order, which has largely stayed them pending a few planned bellwether trials, including one in *Kane 2*. (App. Vol. I at 40 (ECF 378).)

SUWA first moved to intervene in this case in April 2013. (App. Vol. I at 17 (ECF 103, ECF 105).) Consistent with this Court's ruling in *Kane 1 (2010)*, 597 F.3d 1129, the district court denied intervention as of right, but the district court granted SUWA permissive intervention with certain limitations. (App. Vol. I at 22–23 (ECF 181).) For the past decade, consistent with the case management order, the parties have engaged in time-consuming discovery on the historical use of these claimed rights-of-way, which could turn on witness testimony recalling

[1] This brief will refer to this consolidated case as *Kane 2*, although technically the district court has merged the claims raised in *Kane County (2) v. United States*, Case No. 10-cv-1073-CW; *Kane County (3) v. United States*, Case No. 11-cv-1031-CW; and *Kane County (4) v. United States*, Case No. 12-cv-476-CW.

the creation, course, and use of unpaved roads through the Utah desert nearly 50 years ago.

After this Court granted SUWA intervention in the *Kane 1* litigation on the scope of the three remanded rights-of-way, *Kane 1 (2019)*, 928 F.3d 877, SUWA moved again in July 2019 to intervene as of right in *Kane 2*. (App. Vol. I at 54 (ECF 516).) The district court again denied SUWA's motion, reasoning in part that it was not bound by the *Kane 1 (2019)* decision because the mandate had not issued. (App. Vol. I at 56 (ECF 528).) SUWA sought a writ of mandamus from this Court, seeking reassignment of the case and reconsideration of its intervention request. *In re S. Utah Wilderness All.*, Case No. 19-4134. This Court denied the requested writ. (Supp. App. at 60–67 (Order (October 25, 2019))).

In early 2020 the district court held trial regarding fifteen of the 775 claimed rights-of-way selected as bellwethers to help facilitate resolution of the remaining claims. (App. Vol. I at 61–66 (ECF 577, ECF 579, ECF 581–87, ECF 589, ECF 591–93, ECF 595).) Post-trial briefing has been completed and is pending oral argument. After the issuance of the mandate in *Kane 1 (2019)*, 928 F.3d 877, SUWA moved

once again to intervene as of right in *Kane 2*. (App. Vol. VII at 1940–68.) On June 6, 2022, the district court again denied SUWA's motion. (App. Vol VIII at 2290–2343.) The district court's order and opinion—the ruling at issue on appeal here—assumed that SUWA had both standing and a qualifying "interest relating to the property" under Rule 24(a)(2), but the court held that SUWA's interests were adequately represented by the United States. *Id.* On July 8, 2022, on SUWA's motion, the district court certified the issue whether SUWA is entitled to intervene as of right for interlocutory appeal under 28 U.S.C. § 1292(b). (App. Vol. I at 80 (ECF 732).) On September 13, 2022, this Court accepted SUWA's petition to appeal pursuant to 28 U.S.C. § 1292(b). (App. Vol. VIII at 2353–54.)

SUMMARY OF ARGUMENT

Evaluating a claimed right to intervene as a party must begin with a focus on the nature of the action—that is, what the case is about. This case is a quiet-title action, i.e., a *title* dispute between the United States and Kane County regarding claimed R.S. 2477 rights-of-way for public roads that cross federal public lands. The only question before the district court is the existence and scope of any rights-of-way. The

best use of public lands is not at issue. This case is not about future land management decisions.

Rule 24(a)(2) requires an applicant for intervention as of right to meet three requirements: (1) "an interest relating to the property . . . that is the subject of the action"; (2) that "disposing of the action may as a practical matter impair or impede the [applicant's] ability to protect its interest"; and (3) that existing parties would not "adequately represent that interest." Fed. R. Civ. P. 24(a)(2). SUWA fails to meet each of these three requirements.

A panel, however, would be bound by controlling precedent. Because there are no material differences from *Kane 1*, that precedent currently would require affirmance of the district court's denial of intervention as to the determination of title, but reversal granting SUWA intervention as to the issue of the scope of any R.S. 2477 rights-of-way for which the district court quiets title in favor of the County and State. The United States preserves its arguments for further review. Certain basic propositions, however, are common to both aspects of the case (the existence and scope of any rights-of-way) and strongly support

the conclusion that SUWA's motion to intervene of right should be denied in all respects.

1. SUWA does not have a qualifying "interest relating to the property" that is the subject of this action. This is a case about title to property, but SUWA's forward-oriented environmental concerns relate not to ownership but to land use. SUWA therefore lacks the requisite "significantly protectable interest" at stake in the case. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). SUWA's land management concerns are categorically distinct from the property rights being litigated here.

SUWA claims to have a protectable interest based on prior cases that relied on reasoning from litigation involving challenges to agency actions or policymaking involving environmental issues. Because this case is a traditional title dispute that turns, here, on factual questions about historical use of the property prior to 1976, the concern in litigation challenging agency decisionmaking that the United States will have to weigh varied interests in making policy decisions is not present. Rather, this suit presents a "traditional intervention" question in a real property dispute—the United States here is a landowner

protecting its property interests in traditional, fact-based litigation, not making governmental policy. *Cf. City of Stilwell, Okla. v. Ozarks Rural Elec. Coop. Corp.,* 79 F.3d 1038 (10th Cir.1996); *Allard v. Frizzell*, 536 F.2d 1332 (10th Cir. 1976). Although SUWA may have deeply-held interests on the use of public lands in Kane County, on the question of title, SUWA is more akin to a neighbor with preferences regarding a property dispute between other parties concerning a nearby parcel. Such interests do not support a right to intervene as a party.

2. SUWA's interests are also attenuated from the matters being litigated in here. Because this case relates to property ownership while SUWA's concerns relate to future land use, any impact to SUWA's interests is speculative, contingent on assumptions about future decisions about land use. But even if the County and State prevail in the title dispute, widening the roads or other future improvements on R.S. 2477 rights-of-way through federal lands would require federal consultation, which would give SUWA a chance to raise any concerns. SUWA's interests are therefore contingent and derivative of the United States' interests, rather than directly relevant to the title dispute. Consequently, they are too contingent and attenuated from the matters

at stake in the present litigation to provide SUWA a right to intervene and participate as a party. For the same reasons, resolution of the quiet-title action will not impair, as a practical matter, SUWA's ability to protect the interests it asserts. These interests are not cognizable here and thus do not trigger an impairment inquiry. SUWA could seek to challenge, and has challenged, federal decisions about the regulation of, or improvements to, R.S. 2477 rights-of-way, regardless of its intervention in this title dispute.

3. The United States and SUWA share an identical objective in this case—preserving the United States' title and minimizing any rights-of-way consistent with the relevant evidence. The United States is therefore presumed to adequately represent SUWA's interests. SUWA offers no compelling basis to rebut this presumption. SUWA's disagreements about litigation strategy or speculation that a change in presidential administration might possibly lead to a divergence of interests sometime in the future does not suffice to rebut the presumption that the United States adequately represents SUWA's interest. Nor does SUWA's concern that the United States might settle the R.S. 2477 claims, particularly in the context of the United States'

longstanding and vigorous defense of its title. In any event, if the United States and plaintiffs were to reach a settlement on certain claimed rights-of-way, SUWA could not block that settlement even if it were permitted to intervene as a party to this case. Finally, SUWA's suggestion that, contrary to the law of this Circuit, it should be permitted to intervene not just as to the issue of scope, but also as to the issue of title, should be rejected.

STANDARD OF REVIEW

This Court reviews denial of a motion to intervene as of right under Rule 24(a)(2) de novo. *City of Stilwell, Okla. v. Ozarks Rural Elec. Coop. Corp.,* 79 F.3d 1038, 1042 (10th Cir.1996).

ARGUMENT

In evaluating an intervention motion, as the Eighth Circuit has observed in a similar Quiet Title Act case, "it is important to focus on what the case is about." *North Dakota ex rel. Stenehjem v. United States,* 787 F.3d 918, 921 (8th Cir. 2015). This Quiet Title Act action will determine and declare already existing ownership of property based on historical uses. It will not bring any new rights into existence, institute any new land management policies, or implicate any policymaking authority of the United States. The United States is party to this litigation not as a policymaker but rather as a defendant landowner protecting its property interests—i.e., simply seeking to quiet its own title. SUWA's future-oriented environmental interests in wilderness preservation are not at issue in the fact-bound historical inquiry required in this case to quiet title. Rather, the property interests at stake here predate those environmental interests and, indeed, the formation of the Southern Utah Wilderness Alliance.

Rule 24(a)(2) requires that, to intervene as of right, the applicant for intervention must demonstrate (1) that it has "an interest relating to the property . . . that is the subject of the action"; (2) that it is "so

situated that disposing of the action may as a practical matter impair or impede the [applicant's] ability to protect its interest"; and (3) that existing parties would not "adequately represent that interest." Fed. R. Civ. P. 24(a)(2). SUWA has failed to establish each of these requirements. Consequently, as explained further below, this Court should affirm the district court's denial of intervention as of right.

The United States has petitioned for initial hearing of this appeal en banc in light of the fractured nature of Tenth Circuit precedent on intervention and the exceptional importance of this question given its profound effect on litigation about the United States' property rights throughout the West. If the petition is denied, the panel's consideration of these issues will be limited by "the law of the circuit"—the panel would be bound by the holdings of prior panel opinions absent en banc reconsideration or a superseding contrary decision of the U.S. Supreme Court. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).[2] Because the United States is unaware of a material distinction here from *Kane 1*, a

[2] If two prior panels reached conflicting holdings, the panel here would be bound by the earlier decision *See Haynes v. Williams,* 88 F.3d 898, 900 n.4 (10th Cir. 1996) ("[W]hen faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.").

panel would be bound to affirm the denial of intervention as to the determination of title and grant SUWA intervention as to the issue of the scope of any R.S. 2477 rights-of-way for which the district court quiets title in favor of the County and State. To the extent that arguments advanced by the United States here are precluded by the law of the circuit, the United States includes them to be considered by the full Court if it grants initial hearing en banc and to preserve them for further review.

I. SUWA does not have a qualifying "interest relating to the property" that is the subject of this action as required by Rule 24(a)(2).

This is a quiet-title action to ascertain and declare property rights and thereby quiet title with respect to contested rights-of-way for public roads that cross federal public land. The first requirement SUWA must meet to qualify for intervention as of right is demonstrating an "interest relating to the property" that is the subject of this action. To intervene as of right, an applicant must have a "significantly protectable interest" at stake in the case, *Donaldson v. United States*, 400 U.S. 517, 531 (1971)—that is, a "legally protectible" interest, *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 315 (1985). *Donaldson*'s requirement of a

"significantly protectable interest" "[c]learly . . . calls for a direct and concrete interest that is accorded some degree of legal protection." *Diamond v. Charles*, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring in part and concurring in the judgment). The United States submits that the environmental interests upon which SUWA asserts a right to intervene are not "significantly" or "legally" protectable interests in a quiet-title action because they have no bearing on *title*, in which SUWA claims no interest at all.

A divided panel of this Court held in 2019, however, that SUWA possesses a qualifying interest that may be impaired by the litigation for purposes of Rule 24(a)(2)'s intervention requirements. *Kane 1 (2019)*, 928 F.3d at 891–92; *see also San Juan County v. United States* 503 F.3d 1163, 1199 (10th Cir. 2007) (stating that "SUWA's environmental concern is a legally protectable interest") (opinion of Hartz, J.). This holding binds a panel of this court; the United States is not aware of any material distinctions that would make it inapplicable here. The United States has petitioned for hearing en banc, and presents the following arguments to preserve them for further review.

A. SUWA's environmental interests are categorically distinct from the question of title at stake in this quiet-title action.

The right to intervene under Rule 24(a)(2) is a fact-specific inquiry that "must focus on the particular facts and procedural posture of each application." *San Juan County*, 503 F.3d at 1195. Analysis of whether SUWA has asserted "an interest relating to the property . . . that is the subject of the action," Fed. R. Civ. P. 24(a)(2), necessarily begins with the nature of the "action" before the court.

This quiet-title action presents a focused dispute over title to real property the resolution of which depends on historical uses of the property nearly a half-century and longer ago. The future-oriented interests SUWA asserts—its environmental concerns about the preservation of federal public lands—are not interests that are legally "protectable" in a property dispute between third parties. This is a dispute about legal title to property, not about how roads or the public lands they cross will be managed. A quiet-title action is a dispute about ownership of property ("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), and SUWA is a third party to that dispute with no claim of

ownership in the property or any legally-cognizable interest in the question of ownership as between the parties. Various federal statutes protect the interests of persons such as SUWA with respect to certain property of the United States. But those statutes, and the interests protected by them, have nothing to do with the distinct and antecedent question whether the United States has title to the land or a claimed right-of-way to begin with.

Because "SUWA's interest is not related to the property rights at stake," *San Juan County*, 503 F.3d at 1208 (Kelly, J, concurring in judgment), SUWA's interest in the outcome of the dispute does not entitle SUWA to intervene as of right as a party in this quiet-title action. "[T]he interest in land *use* asserted by SUWA" lacks the required connection to "the dispute over land *ownership* in this case." *Id.* That is because those interests do not suffice to render SUWA "a *party* to the question of what real property the United States owns, or whether the United States granted an easement to San Juan County decades ago." *Id.* at 1210 (McConnell, J., concurring in judgment). SUWA has "no legal rights regarding *whether* the United States owns the land" or in the "relative rights of the County, the State, and the

United States" in the claimed roads. *Id.* at 1211. As this Court has recognized in other contexts, it is important to distinguish between a general interest in the broader subject matter of a suit and an intrinsic interest in the specific suit before the court. *See*, *e.g.*, *Statewide Masonry v. Anderson*, 511 Fed. Appx. 801 (10th Cir. 2013) (distinguishing, for intervention purposes, between having a general economic interest in the outcome of a suit and a specific, intrinsic interest in the property at issue in the litigation).

This dispute over title is akin to prior property disputes where this Court denied intervention to third parties with no interest in the specific property dispute at issue. For instance, in a condemnation action by a city against a rural electric cooperative, this Court found that a supplier of electric power to the cooperative did not have a right to intervene based on its financial interests in sales to the cooperative, where it had no specific interest in the property being condemned. *Ozarks*, 79 F.3d at 1042. Likewise, in a constitutional challenge to Migratory Bird Act and Eagle Protection Act as applied to eagle feathers in the possession of the plaintiffs, this Court denied intervention to an environmental group with an interest in protecting

living birds because it asserted "no interest" as to the specific artifacts at issue. *Allard v. Frizzell*, 536 F.2d 1332, 1333 (10th Cir. 1976).

For similar reasons, in a quiet-title action, whether a prospective intervenor has the requisite intrinsic "interest relating to the property" contemplated by Rule 24(a)(2) must be informed by the commonsense judgment that, in a dispute over title, "interest" has to mean something more than personal preference regarding how a property would be used by one party or the other if that party prevailed in the title dispute. As then-Judge McConnell explained in the context of prudential standing:

> Imagine that my next-door neighbor, who keeps his property neat and tidy, is faced with a competing claimant to the land, who is likely to allow the property to fill with weeds. I might very much hope my neighbor wins. My property values and aesthetic interests could seriously be affected. I may be impatient with my neighbor's inclination toward compromise and apparent disinclination to go to court. But no one would say I have standing to sue in defense of my neighbor's property rights.

Wilderness Society v. Kane Cnty., Utah, 581 F.3d 1198, 1232 (10th Cir. 2009) (McConnell, J., dissenting), *rev'd*, 632 F.3d 1162 (10th Cir. 2011) (en banc) (holding that prudential standing barred Supremacy Clause challenge by environmental groups to county regulation of claimed R.S. 2477 roads). Although SUWA may have deeply-held

interests in the use of public lands in Kane County, SUWA's proffered environmental concerns, in the context of this quiet-title action, are akin to the interests of a neighbor regarding a property dispute between others. Such interests do not justify a right to intervene and participate as a party in the property dispute.

The history of Rule 24 demonstrates that these concerns should guide the question of who has the requisite "interest" to intervene as of right. Before the promulgation of the Federal Rules of Civil Procedure, an equivalent to intervention as of right existed in suitssuits in equity and admiralty. *See generally* C. Nelson, *Intervention*, 106 Va. L. Rev. 271, 300–08 (2020). In proceedings that were effectively *in rem* proceedings, intervention practices developed to allow those with a specific interest in the property under the court's control to protect those interests. *Id.* This practice then extended to matters at law, but courts still required that the interest justifying intervention must be one "by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties." *Smith v. Gale,* 144 U.S. 509, 518 (1892).

When Rule 24 was first promulgated in the 1930s, intervention as of right remained limited to those with an interest known and protected by law or who would be effectively bound by the judgment. *See generally* Nelson, *Intervention*, 106 Va. L. Rev. at 311–21. Following a Supreme Court decision in 1961 strictly construing the limitation to parties bound by the judgment (*Sam Fox Publ'g Co. v. United States*, 366 U.S. 683 (1961)), the drafters of the 1966 amendments to Rule 24 sought to relax that requirement (that the party would be bound by the judgment) but intended the interest requirement to remain limited to the types of legal interests that had supported intervention in the past. *See generally* Nelson, *Intervention*, 106 Va. L. Rev. at 329–37.

For these reasons, particularly in a quiet-title action, an "interest relating to the property . . . that is the subject of the action" as used in Rule 24 means some specific or intrinsic interest in title to the particular property that is the subject of the litigation. A quiet-title action is essentially equivalent for present purposes to a proceeding *in rem*. Once the action is initiated, disposition of the disputed title is effectively under control of the court. A prospective intervenor would need a direct and immediate stake in that disposition itself. An asserted

interest in how real property might be *used* in the future, after the question of title is resolved, does not "relate to" the property interests at stake in a quiet-title action.

This understanding of what it means to "relate to" the property at issue in the action is consistent with the limited Supreme Court discussion of similar intervention issues. In *Arizona v. California*, in connection with a dispute involving the Colorado River Indian Reservation and water rights, the Supreme Court denied a motion to intervene by an association of families leasing property from the United States within the reservation. 514 U.S. 1081 (1995). The Court's subsequent decision on the water rights dispute explained that the Court and Special Master both denied intervention to the association on the ground that the association's members "do 'not own land in the disputed area and [the Association] makes no claim to title or water rights,' thus their interests will 'not be impeded or impaired by the outcome of this litigation.'" 530 U.S. 392, 419 n.6 (2000); *cf. Alaska v. United States*, Nov. 2001 Rep. of the Special Master at 14, 534 U.S. 1103, 1103–04 (2002), 2001 WL 36240580 (denying intervention to Tribes in case involving a property dispute between Alaska and the

United States because, although the Tribes "have specific reason for wanting the United States to have title"—namely, that it would allow them to assert rights under the Alaska National Interest Land Conservation Act—the Court "has not considered derivative interests of this kind sufficient to permit intervention").

Here SUWA is a third party with a preference regarding a title dispute between others, not a proper participant in that dispute. Its interests are derivative of the antecedent question whether the United States has title. It has no litigable interests or real stake in relation to the property or title to it. It has no claims or liens involving the property, no mortgage or other security interest, no salvage or subrogation interests, no interests in attachment or sequestration or receivership. Rather, even though it may have deeply-held interests in the use of public lands in Kane County, with respect to the question of title at issue in this suit, SUWA's environmental concerns are more like the preferences of a neighbor indirectly affected by the outcome of a property dispute across the street. Such generalized and derivative interests are insufficient to support a right to intervention. *See San Juan County*, 503 F.3d at 1208 (Kelly, J, concurring in judgment); *id.*

at 1210 (McConnell, J., concurring in judgment); *Statewide Masonry*, 511 Fed. Appx. 801.

SUWA's argument to the contrary rests largely on Judge Hartz's statement in *San Juan County* that "SUWA's environmental concern is a legally protectable interest." 503 F.3d at 1199. (*See* Br. at 20–21.) This statement was later adopted as the Court's holding in *Kane 1 (2019)*. 928 F.3d at 891. The majority opinion in that case concluded that SUWA had a qualifying interest in light of its understanding that the district court proceeding on remand would authorize the future widening of the travel surface of the roads, which could result in environmental impacts. *See Kane 1 (2019)*, 928 F.3d at 892 ("Given . . . the plaintiffs' stated objective of widening the roads, we conclude that SUWA has an interest that may be impaired by the litigation.").

Although this ruling seemed to state a general proposition regarding impaired interests whenever such a dispute concerning the extent or scope of title might arise, and on that legal issue would bind a panel's consideration of this appeal, this holding is in error: SUWA's future-oriented environmental concerns do not qualify as an "interest relating to the property . . . which is the subject of the action" under

Rule 24(a)(2) for the reasons explained above.[3] The mistaken analysis of SUWA's "interest" in *San Juan County* and the *Kane 1 (2019)* majority opinion hinges on precedent from a materially different context: cases considering intervention in the context of Administrative Procedure Act or other public law litigation challenging administrative decisionmaking calling for consideration of environmental factors. In those cases, the Court considered whether prospective intervenors had an "interest in relation to . . . the transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2)—that is, in connection with the challenged agency decision, which was imbued with policy considerations. *See Coal. of Ariz./N.M. Ctys. v. Dep't of Interior*, 100 F.3d 837 (10th Cir. 1996) (litigation about the listing of the Mexican spotted owl); *Utah Assoc. of Ctys. v. Clinton*, 255 F.3d 1246 (10th Cir. 2001) (litigation about the designation of a national monument); *Utahns for Better Transp. v. Dep't of Transportation*, 295 F.3d 1111 (10th Cir.

[3] The *Kane 1 (2019)* opinion also overstates what is at stake in a determination of the scope of an R.S. 2477 right-of-way. While the district court on remand had to resolve whether the roads as they existed at the time of trial were consistent with the pre-1976 uses of the three rights-of-ways at issue, future improvements to widen the travel surface of the roads were not directly at issue.

2002) (litigation about agency's promulgation of a regional transportation plan). The Court's conclusion that intervention was warranted in the circumstances of those cases was informed by the Court's view that the agency actions at issue implicated a broad array of interests, and that the government might not forcefully advance an intervenor's particular interest in light of an asserted obligation to weigh competing public interests.

But, whatever the merits of that analysis, those broader considerations are not present here. As discussed above, this case does not concern "interests in relation to" agency actions or policy decisions, but rather "in relation to the property" at issue, and specifically *title* to that property. It does not involve the evaluation of policymaking by agencies or how the federal government weighed environmental or other interests, as litigation challenging agency decisionmaking might. Instead, like traditional private law litigation, this case involves the application of federal law and state property law to disputed facts from a half-century ago or more, questions that will be resolved by evidence like maps, aerial photographs, and fact testimony from witnesses. These issues do not have a policy component. SUWA's professed

environmental concerns are simply not relevant to the resolution of the question of title in this case.

This Court has distinguished between cases involving "traditional intervention," such as a condemnation suit or a private property dispute, and a challenge to an agency action. *Coal. of Ariz./N.M. Ctys.*, 100 F.3d. at 843.[4] For the reasons explained above, this case is like "traditional intervention" addressed in *Ozarks*, 79 F.3d 1038, and *Allard*, 536 F.2d 1332. It is a property dispute based on historical evidence, more comparable to a condemnation action or a private property dispute. The United States is defending this case not as a policy maker but as a landowner to protect and quiet its title. Fundamentally, SUWA has no right to participate as a party in this quiet-title action because it claims no ownership in the property or competing interests in the property.

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[4] Other courts have drawn similar distinctions. For example, the Eighth Circuit denied intervention in an R.S. 2477 claim to an environmental group, in part because "[t]his is a quiet title action presenting basic questions of competing title interests. The best use of public lands is not at issue. This lawsuit is not about past or future land management decisions where the United States will have to balance varied interests, including conservation, in making land management decisions." *North Dakota ex rel. Stenehjem v. United States,* 787 F.3d 918, 920–21 (8th Cir. 2015).

Six judges from this Court's en banc panel in *San Juan County* found for just this reason that SUWA's general environmental concerns were not the sort of specific interest relating to the property necessary to warrant a right to intervene as a party. *See* 503 F.3d at 1207–08; *id.* at 1210–11. As they explained, "this is not ordinary public law litigation. This is a case about title to real property. . . . It is hard to see how SUWA . . . can be considered a *party* to the question of what real property the United States owns, or whether the United States granted an easement to [the County] decades ago." *Id.* at 1210. Accepting SUWA's contrary proposition that anyone with a preference regarding the outcome of a property dispute has a right to intervene would invite participation by anyone with an articulable preference to participate in the property disputes of others.

The notion that any third party with a preference would have a *right* to participate *as a party*, and not just the option to seek an opportunity to inform the courts of their views as amicus, would be a significant impingement on the conduct of litigation, and without clear limiting principles. SUWA's proposed approach would also result in the perverse outcome that intervention *as of right* would become easier to

obtain than so-called *permissive* intervention under Rule 24(b), which requires the proposed intervenor to "have a claim or defense that shares at least some aspect with a claim or defense presented in the main action." *City of Herriman v. Bell*, 590 F.3d 1176, 1184 (10th Cir. 2010).

SUWA would have no basis to bring a quiet-title claim here against the United States, *see Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978), or against the County and State; nor could SUWA be a defendant in a quiet-title suit over the roads at issue in this litigation, as it has no property interest of its own at stake. Like the applicant for intervention in *Diamond v. Charles*, SUWA asserts "no actual present interest that would permit [it] to sue or be sued" by the existing parties to this case "in an action sharing common questions of law or fact with those at issue in this litigation." *Id.* at 77. These principles help ensure that the proposed intervenor has interests that properly qualify it to act *as a party* in the litigation rather than the sorts of incidental interests an amicus could just as easily put before a court. SUWA's inability to satisfy those principles underscores that its general environmental concerns are not the sort of "direct and concrete interests" Rule 24(a)(2) requires. *Diamond*, 476 U.S. at 75.

Taken to its logical extreme, the standard for intervention advocated by SUWA would instead arguably entitle any hiker or off-road vehicle enthusiast with an interest in the permissible activities on these lands to intervene as of right. That is not consistent with the requirements of Rule 24, nor does it reflect the sorts of interests properly adjudicated in a quiet-title action. The United States' defense of its own title should not be complicated by the intervention of third parties like SUWA that do not assert any specific or intrinsic interest in title to the property at issue.

B. SUWA's environmental interests are too attenuated from the property interests at stake in this quiet-title action.

Setting aside the categorical differences between the historical property interests at stake here in determining title and SUWA's interests regarding potential future land use decisions, SUWA's environmental interests are too attenuated from the matters this case will resolve to support a right to intervene as a party.

Legal recognition of a right-of-way over these lands does not itself have any direct or immediate effect on the environment.[5] Tenth Circuit law makes clear that a decision that Kane County has an R.S. 2477 right-of-way would not result in unfettered discretion to make changes without federal involvement. Any rights-of-way across federal land will still be subject to the United States' reasonable regulation. *See S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 746 (10th Cir. 2005); *Kane 1 (2014)*, 772 F.3d at 1224–25; *Clouser v. Espy*, 42 F.3d 1522, 1537–38 (9th Cir. 1994) (affirming Forest Service's authority to close valid R.S. 2477 routes to motor vehicle traffic); *Adams v. United States*, 3 F.3d 1254, 1258 n.1 (9th Cir. 1993).

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[5] In fact, any property rights Kane County or the State of Utah may be found to have would pre-exist the designation of the relevant areas as federal wilderness study areas or national monuments. Quieting of title here will not bring any new rights into existence. Any rights-of-way already exist. The Grand Staircase-Escalante National Monument reserved and withdrew "all lands and interests in lands owned or controlled by the United States" within the monument boundaries, but that reservation was expressly "subject to valid existing rights." Proclamation 6920 (Sept. 18, 1996). Wilderness study areas are likewise "subject . . . to the continuation of existing mining and grazing uses and mineral leasing." 43 U.S.C. § 1782(c); *see also* Pub. L. No. 94-579, § 701(h), 90 Stat. 2743, 2786 (FLPMA).

Moreover, future improvements to any right-of-way found in this action would require consultation with the United States. Although the State and County could perform routine maintenance of roads on R.S. 2477 rights-of-way, if they want to make future improvements, they

> must advise the federal land management agency of that work in advance, affording the agency a fair opportunity to carry out its own duties to determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights of way as of October 21, 1976, to study potential effects, and if appropriate, to formulate alternatives that serve to protect the lands.

S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d at 748; *see also Kane 1 (2014)*, 772 F.3d at 1224–25 ("The process . . . contemplates a precise order of actions for holders of rights-of-way seeking improvements. First, they consult with the BLM . . . ; then, in the event of a disagreement, the parties may resort to the courts.") (cleaned up).

In other words, the environmental impacts about which SUWA is concerned are contingent, dependent on assumptions and speculation about future actions rather than directly involved in the present title dispute. The place to raise concerns about the potential environmental impact of future land management decisions is after those decision are

made, not in the abstract in advance based on conjecture and speculation in a case involving only title. And, if necessary, SUWA could then seek to litigate any legally-cognizable concerns over federal agency decisions with which it disagreed. In fact, SUWA has sought to litigate its challenges to agency decisions about the regulation and improvement of R.S. 2477 rights-of-way. *See*, *e.g.*, *S. Utah Wilderness All. v. U.S. Dep't of Interior*, Case No. 2:19-cv-00297-DBB, 2021 WL 1222158 (D. Utah March 31, 2021), *aff'd,* 44 F.4th 1264 (10th Cir. 2022).

Thus, as six judges of this Court found in *San Juan County*, there "can be no 'logical or causal connection between' the interest in land use asserted by SUWA and the dispute over land ownership in this case; a mere change in ownership will have no 'practical effect' on the land's use, just as a change in the land's use would not affect the ownership" of the road. 503 F.3d at 1208 (cleaned up). As a result, not only is there a categorical and fundamental disconnect between SUWA's environmental interests and this title dispute, but SUWA's interests are in any event too attenuated to provide SUWA a right to intervene and participate as a party.

For the same reasons, SUWA's asserted interests do not create independent Article III standing, to the extent this Court requires intervenors to show independent standing. *Compare Safe Streets Alliance*, 859 F.3d at 913 (stating that Article III's requirements apply to "all intervenors"), *with Kane 1 (2019)*, 928 F.3d at 886–887 (holding that intervenors can piggyback on the Article III standing of existing parties). SUWA likewise lacks the necessary standing to pursue different claims, defenses, or relief than the United States. *Town of Chester*, 137 S. Ct. at 1648.

II. Resolving the question of title in this action does not impair SUWA's ability to protect its environmental interests.

As noted above, this Court held in 2019 that SUWA has a qualifying interest that may be impaired by the litigation for purposes of Rule 24(a)(2)'s intervention requirements, *Kane 1 (2019)*, 928 F.3d at 891–92, and that holding would be binding on a panel of this Court. The United States presents the following arguments to preserve them for further review.

For the same reasons that SUWA's interests are too attenuated, SUWA also cannot show that resolution of the property claims at issue here may "impair" SUWA's ability to protect its interests. Fed. R. Civ.

P. 24(a)(2). This case is only about title to the right-of-way itself, a dispute in which SUWA can claim no present, legally cognizable interest that should even trigger an inquiry into impairment. And, as discussed above, to whatever extent title in a right-of-way over a particular parcel may be quieted to the County and State, any future improvements to such rights-of-way resulting from this case would require federal involvement, affording SUWA an opportunity to raise any concerns. Even if the State and County were granted any rights-of-way, the United States would continue to reasonably regulate those rights-of-way and manage the surrounding lands; consultation with the United States will be required for anything besides "routine maintenance." *See Kane 1 (2014)*, 772 F.3d at 1224.

SUWA could seek to litigate any challenges it may have to agency decisions about the regulation and improvement of any R.S. 2477 rights-of-way identified in this litigation, as it has done before. SUWA thus may seek to protect its interests regarding land use once actual land use decisions have been made. Consequently, the resolution of this property dispute does not "as a practical matter impair or impede" SUWA's "ability to protect its interest." Fed. R. Civ. P. 24(a)(2).

III. The United States adequately represents the interests that SUWA asserts and seeks to protect by participating in this quiet-title action.

A. This court has held in *Kane 1* that the United States adequately represented SUWA's asserted interests with respect to the determination of title but did not adequately represent SUWA's asserted interests as to the scope of any rights-of-way.

In 2010, this Court held that the United States adequately represents SUWA with respect to the determination of title to R.S. 2477 rights-of-way. *See Kane 1 (2010)*, 597 F.3d at 1132–33. On a subsequent appeal in that same case, a divided panel concluded that the United States did not adequately represent SUWA's interests with respect to the district court's reconsideration on remand of the scope of three rights-of-way. *Kane 1 (2019)*, 928 F.3d at 890–95. The United States is not aware of any material difference in fact or changes in law that would make these two holdings inapplicable. Accordingly, in the absence of any meaningful distinction, on panel consideration, the Court would be bound to deny SUWA intervention as of right on the title determination and grant SUWA intervention as of right regarding the determination of the scope of any rights-of-way. The United States presents the following arguments to preserve them for further review

and to address SUWA's improper suggestion that a panel could reverse the Court's 2010 holding that the United States adequately represents SUWA's interests with respect to title.

B. The United States and SUWA pursue the same objective in this quiet-title action.

SUWA's bid for intervention as of right independently fails because the United States adequately represents the relevant interests of SUWA with respect to the property dispute at issue in this quiet-title action. Under the law of this Circuit, there is a presumption that a prospective intervenor's interest is adequately represented where its objectives in the litigation are identical to an existing party's objectives. *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1113–14 (10th Cir. 2017) ("When the applicant and an existing party share *an identical legal objective*, we presume the party's representation is adequate.") (emphasis added); *City of Stilwell, Okla. v. Ozarks Rural Elec. Coop. Corp.,* 79 F.3d 1038, 1042 (10th Cir. 1996) ("[R]epresentation is *adequate* 'when the objective of the applicant for intervention is identical to that of one of the parties.'" (quoting *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986)).

Here SUWA describes its objective in intervening as "hold[ing] plaintiffs to their burden and minimiz[ing], as much as possible, state and county control . . . over claimed routes," and "minimiz[ing] the scope of those routes if plaintiffs ultimately obtain title." (Br. at 4.) This objective is identical to the United States' objectives for the resolution of this title dispute: preserving the United States' title and minimizing any rights-of-way for the claimed roads strictly to what the evidence establishes. In fact, SUWA itself concedes that "SUWA is seeking the same relief as the United States." (Br. at 16.)

Perhaps recognizing that it shares the same objective as the United States here, SUWA attempts to reframe this precedent as requiring identical *interests*, not identical *objectives*.[6] (*See*, *e.g.*, Br. at 22 ("If the parties' *interests* are identical . . .") (emphasis added).) But this Court has expressly considered claims of differing underlying interests and concluded that they do not justify intervention as of right so long as the applicant and party share the same objectives in the

[6] The second *Kane 1* panel on intervention likewise conflated "objectives" and "interests" in its discussion of this point. *Kane 1 (2019)*, 928 F.3d at 892 ("When a would-be intervenor's and the representative party's *interests* are 'identical,' we presume adequate representation.") (emphasis added).

litigation. *See*, *e.g.*, *Ozarks*, 79 F.3d at 1042 ("While [the applicant's] ultimate motivation in this suit may differ from that of [the original party], its objective is identical—to prevent [the city's] condemnation."); *see generally San Juan County*, 503 F.3d at 1204–07. Whatever its motivations, SUWA's environmental interests in the outcome here "ineluctably flow from its objective of preserving" the *United States'* title, the objective it shares with the United States. *Tri-State Generation and Transmission Ass'n, Inc. v. New Mexico Public Regulation*, 787 F.3d 1068, 1073 (10th Cir. 2015). Indeed, any interest SUWA could assert concerning title to the right-of-way would necessarily be *derivative* of the United States' interest in the title. Accordingly, the United States' conduct of the litigation must be regarded as adequate representation of the interests of its citizens in the land. *Cf. Stenehjem,* 787 F.3d 921 ("In defending its title interests in public lands, the United States as sovereign is presumed to represent adequately the interests of its citizens."); *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) ("when a State is a party to a suit involving a matter of sovereign interest, it is *parens patriae* and must be deemed to represent all of its citizens.") (cleaned up).

"This simply is not a case where the governmental agency must account for a 'broad spectrum' of interests that may or may not be coextensive with the intervenor's particular interest." *Tri-State Generation and Transmission Ass'n*, 787 F.3d at 1073. There are no competing public interests the United States must choose among; its "single litigation objective" is to defend its title. *San Juan County*, 503 F.3d at 1206 (concluding that "the Federal Defendants had only a single litigation objective—namely, defending exclusive title to the road—and SUWA could have had no other objective regarding the quiet-title claim"). For that reason, this Court has previously concluded that "SUWA's disagreement with the United States' land management decisions in the past does not demonstrate that the United States is an inadequate representative in this title dispute, which is ultimately grounded in non-federal activities that predate those management decisions." *Kane 1 (2010)*, 597 F.3d at 1135. The Eighth Circuit has likewise concluded, in the context of intervention in an R.S. 2477 quiet-title action, that the interests of the United States in defending "its *ownership interests*" in public lands means that it adequately

represents its citizens even if there could be differences in view regarding the future *use* of the lands. *Stenehjem,* 787 F.3d at 922.

In any event, because SUWA and the United States share an identical objective in this action, the United States is presumed to adequately represent SUWA's interests. "To overcome this presumption, [the prospective intervenor] must make 'a concrete showing of circumstances' that the [existing party's] representation is inadequate." *Tri-State Generation and Transmission Ass'n*, 787 F.3d at 1073 (quoting *Bottoms,* 797 F.2d at 872, in turn quoting 7A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1909, at 529 (1972)). SUWA has failed to allege, much less make, the type of showing that might meet this requirement—e.g., a "showing that there is collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed to represent the applicant's interest." *Tri-State Generation and Transmission Ass'n*, 787 F.3d at 1073 (quoting *Bottoms,* 797 F.2d at 872–73, in turn citing *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir.1984)). Nothing SUWA has

pointed to reflects the type of circumstance necessary to overcome this presumption.

SUWA contends that it only needs to make a "minimal" showing of divergent interests to establish that there is not adequate representation. (Br. at 21.) But here again, SUWA is relying on case law from a different context. Tenth Circuit cases involving public law challenges to agency actions or policymaking have applied a lower threshold to find representation inadequate because, the Court believed, the agency is weighing many broad and potentially conflicting interests and the applicant may have a discrete and narrower interest the agency may not vigorously protect. *See*, *e.g.*, *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002). But whatever the soundness of such an approach in that context, this is not a case about agency decisionmaking.

Rather, as discussed above, this case is like traditional private law litigation. Quiet-title actions simply seek to settle competing title claims and provide certainty about ownership. This case does not involve an agency decision where there could be "contentions that the government, when it has multiple interests to pursue, will not adequately pursue the

particular interest of the applicant for intervention." *San Juan County*, 503 F.3d at 1203–04. Rather, the United States here "is a party pursuing a single objective." *Id.* at 1204. In these circumstances the presumption of adequate representation "should apply," as SUWA's and the United States' "interests are aligned." *Id.*; *see also Tri-State Generation and Transmission Ass'n*, 787 F.3d at 1073.

The supposed differences in interest offered by SUWA do not overcome that presumption. The primary basis SUWA cites in its opening brief for a divergence in interests is its speculative claim that "because these cases span multiple [presidential] administrations, they inherently involve the possibility of a divergence of interest." (Br. at 23 n.75 (quotation marks omitted).) But the United States has been vigorously defending its title against Kane County's various claims for nearly fifteen years across four presidential administrations. And regardless, mere speculation that there might be a new presidential administration with different views cannot suffice to overcome the presumption of adequate representation. Even putting to one side questions about the propriety of a court engaging in such an inquiry about future actions of another Branch based on speculation about

future political developments to resolve a legal issue in litigation, if the mere prospect of a change in administration sufficed to show a judicially-cognizable divergence of interests, those claiming a right to intervene could make that claim in virtually any litigation involving the United States.

SUWA also asserts that there are "stakeholders to whom the United States is arguably beholden" who "wish to see these roads under the control of the State and Kane County," and that the United States generally wants to maintain "a relationship" with the County. (Br. at 26.) But there is no evidence that these supposed external "stakeholders" are impacting the United States' defense of its title. The only support SUWA provides is that the United States had a different view than SUWA regarding certain litigation judgments in the case. (Br. at 27 & n.89.) But differences in litigation strategy in pursuit of the same objective (here, preserving the *United States'* title) do not overcome a presumption of adequate representation. That the proposed intervenors "would have handled the defense of the case differently" is "not sufficient to challenge the adequacy of representation." *Bumgarner v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 417 F.2d 1305, 1308 (10th

Cir. 1969). SUWA also claims that the United States "must consider internal interests, such as efficient administration of its own litigation resources." (Br. at 28.) But that is a sensible and prudent consideration that any entity involved in significant litigation shares.[7]

None of these unfounded assertions and speculations can properly overcome the presumption that the United States is adequately representing its own interest in vigorously defending its title—and therefore is vigorously defending any derivative interest SUWA may have in the United States' quieting of its title—particularly given the long history of the United States doing so. The United States has every incentive to zealously defend its title, the same objective SUWA shares in this litigation. Ultimately, whatever differences there are in the motivations or general interests, SUWA's *objectives* in this litigation are aligned with the United States'—preserving the United States' title and minimizing any rights-of-way the district court may recognize consistent with the facts and the law. SUWA provides no persuasive argument that the interests of the United States and SUWA diverge on

[7] Nor is it clear that Rule 24 envisions a right to intervene as a party in order to ensure that the existing parties *inefficiently* administer their litigation resources.

answering those historically-bound questions. SUWA offers no way in which it seeks a different outcome in this litigation.

Nor does SUWA offer any unique perspectives on the issues here. Its environmental concerns are not relevant to the question of title. SUWA offers no special expertise, experience, or knowledge that would inform its participation that is not available to the United States, or that SUWA cannot offer as an amicus (or through the permissive intervention that the district court, rightly or wrongly, has allowed with limitations).

Finally, SUWA contends that the United States cannot adequately represent SUWA's interests because the United States might settle some or all of the claimed R.S. 2477 rights-of-way with Kane County and the State of Utah. (Br. 29–30.) But the mere possibility of settlement, by itself, cannot possibly justify intervention as of right. To begin with, the United States can properly advocate for its interests while also considering the possibility of settlement—that is simply prudent and sensible litigation conduct. And the record shows that the United States has vigorously defended its property rights in litigation against Kane County for more than a decade. SUWA's speculation that

the United States might reach a settlement with which SUWA disagrees does not overcome the presumption that the United States is adequately representing its interests.

In any event, these settlement concerns cannot justify intervention here. Even as an intervenor, SUWA would have no power to veto a settlement in this case, because it has no property interest in these roads. Indeed, if the United States were to reach an agreement with plaintiffs regarding title disputes being litigated here, there would no longer be jurisdiction for SUWA to participate in the district court as a party concerning title.[8] It would make no sense to allow SUWA to

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[8] Without "piggybacking" on the Article III "case or controversy" between the existing parties, SUWA would have no basis to pursue any relief. If the existing parties reached a settlement agreement, SUWA would have no cause of action, claim for relief, or other legally protectable interest by which it could dispute title. SUWA itself suffers no actual, concrete and legally cognizable injury from a resolution of the historical question of which party owns title. Nor would any injury to SUWA's land use preferences be fairly traceable to the question of ownership rather than the later land use decisions that would be the proximate cause of any change to the environment. Indeed, the only injury SUWA mentions expressly in its opening brief is the speculative assertion that "the County and State intend[] to widen and improve the routes at issue" which would "inevitably increas[e] traffic in scenic areas" it seeks to protect. (Br. at 17.) But, as discussed above, any widening of the roads or other improvements would require federal consultation and afford SUWA an opportunity to raise any concerns. *See supra* Part I.B.

intervene based on its speculative concerns about potential settlement where SUWA would lack any basis to challenge a settlement of the question of title even if intervention were granted.

This is a quiet-title action focused solely on the existence and scope of any claimed R.S. 2477 rights-of-way. Because the United States and SUWA have identical objectives—in SUWA's words, "seek[] the same relief" (Br. at 16)—the United States is presumed to adequately represent its interests. SUWA has not rebutted that presumption.

C. At a minimum, the United States adequately represents SUWA with respect to title under circuit precedent.

In its opening brief, SUWA argues for intervention to address issues of both title and scope, in contravention of this Court's holding in *Kane 1 (2010)* that the United States adequately represents SUWA with respect to issues of title. 597 F.3d 1129, 1133–35. SUWA argues that the issues of title and scope are so "intertwined" that there is no practical way to limit SUWA's ability to participate on title while allowing it to participate on scope. (Br. 32–34.) In making this argument without seeking en banc consideration, SUWA asks this Court to disregard its holding in *Kane 1 (2010)*. SUWA points to no

distinguishing facts or changes in controlling law, but instead simply argues, in effect, that the distinction between title and scope drawn by the second *Kane 1* panel to consider intervention was not analytically sound.

The United States agrees with SUWA that this distinction is not analytically sound or practically meaningful. The district court cannot find the existence of a right-of-way without defining its scope. For that reason, the *Kane 1 (2019)* decision was in error. This is one of the reasons that the United States has petitioned for initial en banc review.

But in 2018, following the remand for further proceedings in the district court regarding the scope of three rights-of-way in *Kane 1*, SUWA nevertheless argued to the second *Kane 1* panel that the United States no longer adequately represented SUWA's interests (and that the panel was not bound by the holding of the first *Kane 1* panel to consider intervention) because the remaining claims involved the scope of the roads, which was a "nuanced determination" different from the binary determination of title, "chang[ing] the intervention calculus." (Supp. App. at 50–54 (*Kane County (1) v. United States*, Case No. 18-4122, Br. of Appellant SUWA (Oct. 22, 2018), at 40–44).) And

the 2019 panel's holding was explicitly limited to scope. *Kane 1 (2019)*, 928 F.3d at 894 ("though SUWA and the United States had identical interests in the title determination, they do not on scope.").

Having convinced the second panel that scope was different from title, SUWA now seeks to use the second panel's holding to, in effect, overturn the holding of the first panel by now arguing that title and scope are inextricably intertwined, and that SUWA has a right to intervene as to *both*. But if the distinction drawn by the second panel between scope and title is analytically infirm (as the United States agrees it is), and if the two panel decisions conflict, the law of the circuit would require the panel to disregard the holding of the second panel and applying the holding of the first, at least so long as the appeal remains before a panel of this Court and not before the full Court en banc. *See Haynes v. Williams,* 88 F.3d 898, 900 n.4 (10th Cir. 1996) ("[W]hen faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.").

SUWA's contentions and litigation tactics—along with the fractured decisions of this Court articulating an analytically unsound and unstable set of results on intervention—confirm that initial en banc

consideration by this Court is required to establish a coherent framework. Quiet-title litigation concerning R.S. 2477 rights-of-way has already lasted fifteen years, with litigation over intervention complicating its resolution. The Court should not allow this state of affairs to continue.

CONCLUSION

For these reasons, the United States respectfully requests that this Court affirm the district court's denial of intervention.

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STATEMENT REGARDING ORAL ARGUMENT

Though deferring to the Court's judgment on the matter, the United States believes that oral argument would be useful to the Court, given the significant and complex questions this appeal raises regarding intervention.

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 12,137 words.

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s/ *John E. Bies*
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

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s/ *John E. Bies*
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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I electronically filed the foregoing answering brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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