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Federal Rule 24: Defining Interest for Purposes of Intervention of Right by an Envirnomental Organization

Jean L. Doyle

NOTES

FEDERAL RULE 24: DEFINING INTEREST FOR PURPOSES OF INTERVENTION OF RIGHT BY AN ENVIRONMENTAL ORGANIZATION

I. INTRODUCTION

Imagine a courtroom during a traditional civil trial. Your mental picture may or may not include a jury, but it almost certainly includes a judge and two opposing parties. Imagine that these two parties are involved in a dispute over the relative merits of a piece of property, perhaps over its value from opposite perspectives — as industrial land or as part of a public park. Now imagine third parties who find this dispute important. There may be many such parties, but undoubtedly one is a citizen group concerned about the environmental value of the disputed property. Imagine that the more this citizen group sees and hears of this ongoing litigation, the more concerned it becomes that neither party to the suit has the group's precise concerns in mind. Assume that this group determines to make its interests known — what is the best way for it to proceed?

An environmental group caught in the situation described can choose from a number of options. First, the group can file its own lawsuit. This option raises problems of its own, however, including the expense of initiating a suit[1] and the question of the group's standing to sue.[2] Second, the

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1. Initiating and carrying through a lawsuit is an expensive proposition. Most environmental organizations, dependent upon donations, are notoriously short of money and want to assert their interests as inexpensively as possible. *See* Note, *Intervention in Government Enforcement Actions*, 89 HARV. L. REV. 1174 (1976) (discussing the high cost of private litigation).

2. The problem presented here is not with the organization's standing to represent the interests of its members, but with the nature of the interest which the group seeks to represent. Under traditional standing doctrine,

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977); *see also* International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock, 106

group can wait for one of the existing parties to recognize the group's interest and join the group in the litigation.[3] Since joinder must be initiated by

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S. Ct. 2523 (1986) (summarizing associational standing doctrine).

Representation of the environmental interest, however, has not been so well recognized. Because those seeking to represent environmental and aesthetic interests are often deemed to represent the public interest rather than an individual injury, they may be denied standing on the ground that they represent only a "generalized grievance." Warth v. Seldin, 422 U.S. 490, 499 (1975) (jurisdiction is not warranted "[w]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens"); Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (the plaintiff must show that "he has sustained or is in immediate danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally."). A statute providing for standing may ease the group over this hurdle. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (allowing, under the Administrative Procedure Act, an association of five law students to challenge an Interstate Commerce Commission rate structure on the grounds that the rate structure had an adverse environmental impact); Sierra Club v. Morton, 405 U.S. 727 (1972) (recognizing the viability of the aesthetic interest, despite its generalized nature, in a challenge under the Administrative Procedure Act); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967) (allowing plaintiffs to challenge placement of an interstate highway under the Highway Act); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965) (allowing conservation organizations to challenge the Federal Power Commission's issuance of a license to construct a power plant under a judicial review provision of the Federal Power Commission Act), *cert. denied*, 384 U.S. 941 (1966). For a further discussion of the public interest problem see Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) (discussing generally the plight of a plaintiff seeking to represent a public interest in light of constitutional standing requirements); Note, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254, 1275 (1970) [hereinafter Note, *Equity and the Ecosystem*] (standing is an obstacle to successful litigation for environmental groups that rely on "amorphous injuries to intangible interests"); Note, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 U.C.L.A. L. REV. 1070, 1082-1100 (1970) [hereinafter Note, *Role of the Judiciary*] (discussing the need to expand standing to seek review of action by administrative agencies when the action affects environmental quality); Note, *Standing to Sue and Conservation Values*, 38 U. COLO. L. REV. 391 (1966) [hereinafter Note, *Standing and Conservation Values*] (discussing the tendency of the federal courts to evaluate standing in terms of economic interests only). For further discussion of the need for a statute with regard to environmental suits see Note, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L.Q. 561, 579 (1971) (because the common law does not see environmental problems as causing personal injury those bringing environmental suits must look to statutes).

3. Joinder is controlled by FED. R. CIV. P. 19 which provides in pertinent part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in an action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If the person has not been so joined, the court shall order that he be made a party.

the original parties, if those parties are not aware of the group or are opposed to the group's viewpoint, waiting for joinder will prove ineffective.[4] Third, the group can adopt the role of amicus curiae. Although filing an amicus brief is the traditional method by which a third party presents unrepresented views to the court, the role of an amicus curiae is purely advisory.[5] If the group hopes to significantly influence the outcome of the litigation, filing an amicus brief will not be enough.

A fourth option is for the group to intervene under Federal Rule of Civil Procedure 24.[6] In contrast to the other options discussed, intervention

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FED. R. CIV. P. 19.

4. Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31, 69 (1979).

5. Jones, *supra* note 4, at 33. Jones feels that the role of amicus curiae is most useful "in the appellate context, in marshalling legal arguments or in presenting sociological data designed to expand the general informational basis for decisionmaking. Where the dispute revolves around proof of factual matters . . . a party to the litigation is in a clearly superior position." *Id.* at 33. An additional problem is that the role of amicus curiae is completely subject to the court's discretion and carries with it no right of appeal, Note, *supra* note 1, at 1196, a situation which may be inadequate for effective representation. For information on the possibilities of amicus participation see Note, *Quasi-Party in the Guise of Amicus Curiae*, 7 CUMB. L. REV. 293 (1976) (surveying the development of amicus participation and distinguishing it from intervention); Note, *Amicus Curiae Participation — at the Court's Discretion*, 55 KY. L.J. 864 (1967) (analyzing the trend toward greater amicus participation).

6. FED. R. CIV. P. 24 provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

both proceeds on the group's own initiative and allows the group to actually become a party to the suit.[7] In addition, intervention is superior to the group's other options as it avoids the costs of initiating litigation[8] and may, depending on the position taken by a particular court, ease problems with standing.[9] Because of these advantages, intervention is certainly the best choice for an environmental group that wants to take an active part in ongoing litigation.

Once a group has decided to move for intervention it must decide between the two types provided for by Federal Rule 24, intervention of right and permissive intervention.[10] These provisions are different in two important respects. First, intervention of right is generally said to pose only a question of law,[11] while permissive intervention is purely discretionary with the court.[12] A second distinction is that the applicant for intervention of

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FED. R. CIV. P. 24.

7. 7C C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1901, at 228 (1986) [hereinafter WRIGHT & MILLER].

8. Shreve, *Questioning Intervention of Right: Toward a New Methodology of Decisionmaking*, 74 NW. U.L. REV. 894, 896 (1980) (listing among incentives to intervene the "opportunity to litigate a claim more quickly or inexpensively as an intervenor than would be possible if the absentee commenced an independent suit"); Note, *supra* note 1, at 1184 (the cost of bringing a private suit should weigh in favor of intervention if the cost effectively makes the party's interest non-litigable).

9. *See infra* notes 183-207 and accompanying text.

10. Intervention of right is covered by FED. R. CIV. P. 24(a) and permissive intervention by FED. R. CIV. P. 24(b). These provisions may be argued in the alternative. *See* United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985) (environmental group denied permission to intervene under either Rule 24(a) or 24(b)), *cert. denied*, 106 S. Ct. 1956 (1986); Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980) (National Organization of Women moved to intervene in suit under Rule 24 generally, permission to intervene was granted under Rule 24(a)); Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) (permission to intervene sought under either Rule 24(a) or 24(b)). *See also* WRIGHT & MILLER, *supra* note 7, § 1902 stating:

> Patently the rule does distinguish between these two kinds of intervention but the distinction is neither as clearcut nor as important as the usual statement of it would suggest. Applicants often will rely on both subdivision (a) and subdivision (b) and it is not at all uncommon for a court to hold that intervention will be allowed without specifying which branch of the rule it considers to be on point.

Id. at 231.

11. WRIGHT & MILLER, *supra* note 7, § 1902, at 231. Intervention of right is said to be a question of law since, by its terms, if the requirements are satisfied the third party "shall" be permitted to intervene. Shreve, *supra* note 8, at 896-98. *See also* United States v. Reserve Mining Co., 56 F.R.D. 408, 411 (D. Minn. 1972) (satisfaction of the Rule 24(a)(2) requirements establishes the right to intervene).

12. United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985) ("Permissive intervention is wholly discretionary with the . . . court and will be reversed only for abuse of discretion."), *cert. denied*, 106 S. Ct. 1956 (1986); *Reserve Mining*, 56 F.R.D. at 412 stating that "[t]he prerequisites to permissive intervention are, therefore, that the applicant's claim or defense have a common question of law or fact with the main action. Beyond this, allowance of intervention is within the discretion of the court, giving consideration to equitable principles of delay or prejudice of the case." *Id. See also* Shreve, *supra* note 8, at 896-98 (satisfaction of

right need not show independent grounds for jurisdiction.[13] In contrast, those seeking permissive intervention must show both subject matter jurisdiction and independent grounds for personal jurisdiction.[14] Because intervention of right is not open to discretion or to defeat by lack of jurisdiction, but is subject only to satisfaction of Rule 24's requirements,[15] it is clearly the better choice for an environmental group which seeks to influence ongoing litigation.

This note will focus on the ability of an environmental group to intervene of right under Federal Rule 24(a)(2),[16] which requires 1) that the proposed intervenor have "an interest relating to the property or transaction which is the subject of the action" and 2) that he be situated such that his ability to protect that interest will be impaired by the outcome of the ongoing litigation.[17] Courts disagree, however, on what will qualify as an interest for purposes of this test.[18] Because there are no guidelines for courts to follow, environmental groups representing almost identical interests have met with different fates when seeking to intervene.[19]

This note proposes guidelines for determining when an environmental

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the standards for permissive intervention does not necessarily result in intervention); WRIGHT & MILLER, *supra* note 7, § 1902, at 231 (applications for permissive intervention are within the discretion of the court).

13. United States v. Local 638, 347 F. Supp. 164 (S.D.N.Y. 1972) (independent federal jurisdiction not required for intervention of right). *See also* M. GREEN, BASIC CIVIL PROCEDURE 95 (2d ed. 1979); Hilliker, *Rule 24: Effective Intervention*, 7 LITIGATION 21 (Spring, 1981) stating that "[t]he applicant for intervention of right need not show subject matter or personal jurisdiction to support his presence in the case. Even if diversity would be destroyed the intervenor of right may participate and federal jurisdiction will not be defeated." *Id.* at 23.

14. Blake v. Pallan, 554 F.2d 947, 955 (9th Cir. 1977) (applicant for permissive intervention must be supported by independent jurisdictional grounds); Francis v. Chamber of Commerce, 481 F.2d 192 (4th Cir. 1973) (a party seeking permissive intervention must establish independent grounds of jurisdiction). *See also* M. GREEN, *supra* note 13, at 95; WRIGHT & MILLER, *supra* note 7, § 1902, at 231; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 75, at 506-07 (4th ed. 1983); Hilliker, *supra* note 13, at 23. In discussing permissive intervention Hilliker states that "[t]he applicant for permissive intervention must demonstrate subject matter jurisdiction and independent grounds for personal jurisdiction. He must meet applicable jurisdictional amount requirements as though he had brought the action originally. Permissive intervention will be denied if the applicant's presence would destroy diversity." *Id.* at 23.

15. Shreve, *supra* note 8, at 896-98.

16. FED. R. CIV. P. 24(a)(1) provides for intervention when the right to intervene is conferred by a statute, such as the provision for intervention by the Administrator or Attorney General in the Safe Drinking Water Act, 42 U.S.C. § 300j-8(c) (1982). Statutory intervention is not dealt with in this note.

17. *See* FED. R. CIV. P. 24(a)(2).

18. *See* WRIGHT & MILLER, *supra* note 7, § 1908. *See also* Hilliker, *supra* note 13, at 21 (no clear cut test exists under Rule 24(a)) and cases discussed *infra*, notes 117-52 and accompanying text.

19. *See infra* notes 134-36 and 150-52 and accompanying text.

organization seeking to intervene of right in an ongoing lawsuit meets the interest requirement. These guidelines are based on an analogy between the interest requirement of intervention of right and the injury in fact requirement of the constitutional doctrine of standing. In order to develop these guidelines, this note will first present background information on the history of intervention practice.[20] Second, the policies behind intervention will be considered.[21] Third, Federal Rule 24's interest requirement will be discussed and the current interpretation of this requirement will be explored.[22] Fourth, an analogy will be drawn between the purposes of the interest requirement for intervention and the injury in fact requirement for standing.[23] Finally, guidelines for intervention will be proposed based on the analogy to standing.[24] By drawing this analogy and presenting these guidelines, this note seeks to promote recognition and consistent treatment of the environmental interest in intervention questions.

II. HISTORICAL DEVELOPMENT OF INTERVENTION AND FEDERAL RULE 24

Intervention, although a comparatively recent development in Anglo-American legal procedure,[25] is deeply rooted in legal history. Intervention practice can be traced back to Roman Law where it was apparently a common and extensive procedure, especially at the appellate level.[26] Broadly interpreted by medieval scholars, Roman intervention practice first appeared in the civil law tradition, and is still a familiar device in civil law countries today.[27]

The Roman practice of intervention was introduced into England through the ecclesiastical courts and into the United States through both the English common law and the civil law practice of Louisiana.[28] In this country, intervention made its first significant appearance in admiralty in

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20. *See infra* text accompanying notes 25-75.

21. *See infra* text accompanying notes 76-113.

22. *See infra* text accompanying notes 114-56.

23. *See infra* text accompanying notes 157-207.

24. *See infra* text accompanying notes 208-20.

25. WRIGHT & MILLER, *supra* note 7, § 1901, at 228.

26. Moore & Levi, *Federal Intervention I: The Right To Intervene and Reorganization*, 45 YALE L.J. 565, 568 (1936). Moore and Levi state that Roman law permitted intervention at the appellate stage on the theory that "the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the petitioner's interest thus [sic] be inadequately protected." *Id.* Under Roman law it was apparently not always necessary to show that a third party would be bound by the ongoing proceeding or that the intervenor had a legal interest, a humanitarian interest was considered sufficient. *Id.* at 569.

27. *Id.*

28. *Id.*

rem proceedings.[29] In such proceedings, any determination of ownership by the court was considered binding on third parties as well as on the original parties to the action.[30] Because of the binding nature of these proceedings, the courts recognized the necessity of intervention to protect the interests of third parties asserting a claim to a fund or physical object in the control of the admiralty court.[31]

Despite its introduction into admiralty, intervention practice was slow to make its way into the courts of either law or equity.[32] Of the two divisions, equity took the more liberal approach. In courts of equity third parties were generally allowed to join existing litigation if they could prove that the controversy between the main litigants affected their interests.[33] For purposes of intervention, this proof was accomplished by a petition *pro interesse suo*.[34] By granting this petition, the equity court permitted the non-party to enter a pending suit and assert its interest, thereby preventing the non-party from being bound by a determination of ownership in which it had had no part.[35]

In suits at law, on the other hand, intervention was severely limited.[36]

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29. *Id. See also* Indian River Recovery Co. v. The China, 108 F.R.D. 383, 385 (D. Del. 1985) (discussing the history of intervention in admiralty proceedings). In early admiralty in rem proceedings, as one admiralty case described the process, "all persons having an interest in the thing may intervene *pro interesse suo*, file their claims, and make themselves party to the cause, to defend their own interests." The Mary Anne, 16 F. Cas. 953, 954 (D. Me. 1826) (No. 9,195).

30. The Trenton, 4 F. 657 (E.D. Mich. 1880) (a judgment in rem binds not only the parties before the court but gives "good title against the world"); *The Mary Anne*, 16 F. Cas. at 954 (if third parties were not protected "the greatest injustice would be done, because a decree of the court in rem is binding on all the world as to points which are directly in judgment before it"). *See also Indian River Recovery Co.*, 108 F.R.D. at 385 (discussing the history of intervention in admiralty generally).

31. Moore & Levi, *supra* note 26, at 569-70.

32. *Id.* at 570.

33. M. GREEN, *supra* note 13, at 72. Green explains that the equity courts were more liberal because they existed in order to "relieve against the rigor of the common law" and to "furnish a remedy when the common law provided for none." Therefore, the equity courts recognized causes of action not cognizable at law and "expanded the scope of a suit by permitting the joinder of parties whose interests would be affected by the controversy between the main litigants." *Id.*

34. *Pro interesse suo* is defined as "in proportion to its own interest." BALLENTINE'S LAW DICTIONARY 1031 (1st ed. 1930). By filing such a petition a non-party could claim an interest in property under the control of the court. Moore & Levi, *supra* note 26, at 570-71; Note, *Federal Civil Procedure: Intervention of Right Granted Private Party in Government Antitrust Suit Under New Rule 24(a)(2)*, 1968 DUKE L.J. 117, 119.

35. Moore & Levi, *supra* note 26, at 570-71; Note, *supra* note 34, at 119.

36. M. GREEN, *supra* note 13, at 72; Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721 (1968). In discussing the history of intervention Shapiro states that "after courts of admiralty, and later of equity, recognized intervention as a proper means of asserting an interest in property . . . there remained consid-

This limitation stemmed both from the inflexibility of the procedural system[37] and from the fact that, at law, the plaintiff was traditionally regarded as "master of his suit."[38] In addition, civil actions were historically regarded as private controversies between plaintiff and defendant.[39] The idea that a third party could invite itself into a lawsuit thus ran counter to two fundamental principles of Anglo-American law — the ability of a plaintiff to have complete control of the lawsuit and the private nature of the controversy.[40]

The development of state procedural codes, and the consequent merger of law and equity, greatly simplified legal procedure.[41] Because most codes provided for intervention in certain circumstances, the practice became more common, but no more uniform.[42] While some codes provided for intervention on a fairly liberal basis, most code provisions for intervention reflected the property concept begun by the admiralty courts.[43] Even under the codes, intervention was generally allowed only in proceedings incidental to the action at law, such as attachment,[44] or in very unusual circumstances, such as disputes over ownership of real or personal property.[45] Through the Conformity Act,[46] which applied state practice to the federal

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erable uncertainty for many years about whether, and to what extent, intervention could be permitted in a routine action at law." *Id.* at 721.

37. M. GREEN, *supra* note 13, at 93.

38. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.19, at 512 (2d ed. 1977) [hereinafter JAMES & HAZARD]. *See also* Moore & Levi, *supra* note 26, at 572.

39. Shapiro, *supra* note 36, at 721. This notion has changed over the years. *See infra* text accompanying notes 72-75.

40. JAMES & HAZARD, *supra* note 38, § 10.19, at 512.

41. M. GREEN, *supra* note 13, at 3. Green discusses the development of state procedural codes as the second period in the development of modern civil procedure in this country. According to Green, the first such period is the common law period, from the beginning of the nation until the middle of the 19th century, and the third begins with the promulgation of the Federal Rules. The second period began in 1849 when New York adopted a Code of Civil Procedure which merged the common law, dual-court system of law courts and equity courts. This New York code served as a model for reform in other states. *Id.*

42. JAMES & HAZARD, *supra* note 38, § 10.19, at 512. *See also* M. GREEN, *supra* note 13, at 93.

43. JAMES & HAZARD, *supra* note 38, § 10.19, at 512; Note, *supra* note 34, at 119.

44. Moore & Levi, *supra* note 26, at 572.

45. JAMES & HAZARD, *supra* note 38, § 10.19, at 512. *See also* Moore & Levi, *supra* note 26, at 572.

46. Although the Judiciary Act of 1789, ch. 20, 1 Stat. 73, gave the federal courts power to make procedural rules, this power was truly exercised only in admiralty and equity. In actions at law the policy generally was to conform procedure in the federal courts to state practice. At first this conformity was to be static, as provided for by the Act of May 8, 1792, ch. 36, 1 Stat. 275. Under this act state practice as of September 29, 1789, was to be followed regardless of any changes made by the states after that date.

Static conformity, however, proved unsatisfactory, particularly when the states began to enact procedural codes. Under the concept of static conformity these codes could not be applied in the federal courts and two procedural systems were thus necessary in each state. In

courts in law actions, and through the 1912 adoption of Equity Rule 37,[47] similar restrictions were placed on intervention in the federal courts.[48] Consequently, third parties, if they were considered at all, were generally seen as "undesired intermeddlers" who should protect themselves by bringing their own suits.[49]

The modern age of intervention practice began in 1938 when the United States Supreme Court promulgated uniform Rules of Civil Procedure for the federal courts.[50] As originally adopted, Rule 24(a) both codified existing federal practice as it related to intervention and attempted to liberalize that practice.[51] Accordingly, the 1938 rule categorized two situa-

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order to deal with this situation Congress enacted the Conformity Act of 1872, ch. 255, 17 Stat. 197, which provided in part that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district court shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes of actions in the courts of record of the state within which such district courts are held. . . ." *Id.*

This act thus substituted a dynamic conformity for the former static conformity, a situation that existed until the Federal Rules of Civil Procedure were adopted in 1938. Although an improvement over static conformity, under the Conformity Act practice among the federal courts was far from uniform, varying from archaic to modern depending upon the procedural code of the state in which the federal court sat.

For further information on the Conformity Act see JAMES & HAZARD, *supra* note 38, § 1.7; C. WRIGHT, LAW OF FEDERAL COURTS § 61 (2d ed. 1970).

47. In contrast to actions at law, see *supra* note 46, in equity the federal courts exercised their rulemaking authority from the beginning. JAMES & HAZARD, *supra* note 38, § 1.7, at 21. Equity Rule 37, adopted in 1912, provided that "[a]nyone claiming an interest in the litigation may at anytime be permitted to intervene to assert his right by intervention, but the intervention shall be in subordination to and in recognition of the main proceedings." Equity R. 37, 226 U.S. 659 (1912). This rule not only reflected the "property" concept begun in admiralty, Note, *supra* note 34, at 119, but, through the requirement that intervention be subordinate to the main action, was interpreted such that the intervenor had to take the side of one of the original parties. This interpretation, since it did not promote intervention by anyone antagonistic to both existing parties, greatly lessened intervention's practical value. JAMES & HAZARD, *supra* note 38, § 10.19, at 512.

48. Moore & Levi, *supra* note 26, at 577; Note, *supra* note 34, at 119.

49. Shapiro, *supra* note 36, at 721.

50. M. GREEN, *supra* note 13, at 3. Green sees the promulgation of the Federal Rules as the beginning of the third, and final, phase of the development of civil procedure in this country. The Federal Rules were promulgated in response to pressure to formulate a system of procedural rules for law actions, comparable to that which existed in equity, and thus to make procedure in the federal courts uniform. This pressure led to the Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1982)). Under this statute, which united law and equity, an Advisory Committee for the Federal Rules of Civil Procedure was formed and the Federal Rules, which became effective in 1938 were drafted. JAMES & HAZARD, *supra* note 38, § 1.7.

51. The Advisory Committee notes to Rule 24 as originally promulgated state that the rule "amplifies and restates the present federal practice at law and in equity." This is cited as indicating a liberalization of intervention practice by Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 133-34 (1967). *See also* M. GREEN, *supra* note 13, at 93;

tions in which intervention in an ongoing suit would be allowed of right, Rule 24(a)(2) and Rule 24(a)(3).[52] Of these two provisions, Rule 24(a)(2) was the more expansive, as it provided for intervention in cases other than those determining ownership of property.[53] The second provision for intervention of right, Rule 24(a)(3), restricted itself to previous intervention practice by providing for intervention by a non-party claiming an interest in specific property controlled by the court.[54]

Rule 24 has been amended four times since its original adoption in 1938, but, for purposes of this analysis, only the 1966 amendment to Rule 24(a) is of major significance.[55] This amendment was adopted in response to a number of problems which had arisen in the interpretation of the 1938 rule.[56] The first problem involved cases in which the applicant had no other effective remedy if intervention were denied, but where the language of Rule 24 did not cover the applicant's situation.[57] Prior to the 1966 amend-

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WRIGHT & MILLER, *supra* note 7, § 1903; Note, *supra* note 34, at 119.

52. WRIGHT & MILLER, *supra* note 7, § 1903. These authors state that the separate provisions were adopted in order to provide for the two kinds of intervention statutes which had been adopted by the states, those basing intervention on inadequate representation and those basing intervention on cases of specific property. *Id.* at 233-34. *See also* Note, *supra* note 34, at 119. The 1938 version of Rule 24(a) provided for intervention:

> (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of the property which is in the custody or subject to the control or disposition of the court or an officer thereof.

FED. R. CIV. P. 24(a), 308 U.S. 690 (1939).

53. The 1938 version of Rule 24(a)(2) provided for intervention when a non-party would be bound by the court's decision, Note, *supra* note 34, at 119, whether or not that decision dealt with specific property, if the non-party's interests were not already adequately represented in the litigation. *See also* Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 333 (1969).

54. Note, *supra* note 34, at 119. *See also* WRIGHT & MILLER, *supra* note 7, § 1903. *See generally* Kennedy, *supra* note 53, at 333-34.

55. WRIGHT & MILLER, *supra* note 7, § 1903, at 235. The first amendment to the rule took place in 1948, broadening the property clause to allow intervention when property was in the custody of some officer other than the court but still subject to the control of the court, and specifically providing for intervention by governmental agencies and officers through addition of the last sentence of Rule 24(b). A second amendment in 1949 merely updated the statutory reference in Rule 24(c). A third amendment in 1963 required that a motion to intervene be served on all parties rather than only on those thought to be affected by the motion. *Id.* at 234-35. *See also* Kennedy, *supra* note 53, at 336-37.

56. FED. R. CIV. P. 24 advisory committee notes. *See also* M. GREEN, *supra* note 13, at 93; Kennedy, *supra* note 53, at 336; Note, *supra* note 34, at 119.

57. Kennedy, *supra* note 53, at 335. In particular, this problem arose when the property in question was not in the custody of the court as required by Rule 24(a)(3). *See* Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951) (denying intervention when claim of harm was entirely speculative); Cheyenne River Sioux Tribe of Indians v. United States, 338 F.2d 906 (8th Cir. 1964) (Indian tribe not an indispensible party to a condemnation action against

ment, the courts primarily responded to this problem by stretching the language of all three provisions of the rule, particularly the "property in the custody of the court" language of Rule 24(a)(3), so as to cover these borderline cases.[58] In response to this broad interpretation of the 1938 rule's custody language, the 1966 amendment eliminated the custody requirement in favor of the current requirement that the proposed intervenor have an interest "relating to the property or transaction which is the subject of the action."[59]

The second problem arose from the "is or may be bound by a judgment in the action" language of former Rule 24(a)(2).[60] In interpreting this language, some courts read this to mean that it was enough if the judgment would have adverse practical effects upon the non-party.[61] In contrast, the Supreme Court took a restrictive view and required that the party be legally bound in the sense of res judicata.[62] Given the second requirement of Rule 24(a)(2) — that the party's representation in the suit be inadequate — this narrow reading of the word "bound" created a dilemma that made it literally impossible to intervene under Rule 24(a)(2).[63] If an absent party's interest was in fact inadequately represented, that party could not

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a member of the tribe even though award would be paid from funds deposited to credit of tribe), *cert. denied*, 382 U.S. 815 (1965).

58. Kennedy, *supra* note 53, at 335-36. For an example of this expansion by the courts see Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir.) (holding that a secret formula was property subject to the control of the court when the formula was sought in discovery), *cert. denied*, 363 U.S. 830 (1960). *See also* FED. R. CIV. P. 24 advisory committee's note (disregarding the language of Rule 24(a)(3) was natural because Rule 24(a)(3) was too restrictive); WRIGHT & MILLER, *supra* note 7, § 1907.

59. WRIGHT & MILLER, *supra* note 7, § 1903; Kennedy, *supra* note 53, at 336. Explaining the reason for the change in language the Advisory Committee notes state:

> If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of.

FED. R. CIV. P. 24 advisory committee's note.

60. WRIGHT & MILLER, *supra* note 7, § 1903, at 236, § 1907, at 250-53. For the language of the rule see *supra* note 52.

61. International Mortgage & Inv. Corp. v. Von Clemm, 301 F.2d 857 (2d Cir. 1962) (holding that a proposed intervenor is sufficiently bound if an adverse judgment would seriously prejudice him); Ford Motor Co. v. Bisanz Bros., Inc., 249 F.2d 22, 28 (8th Cir. 1957) (although proposed intervenor is not technically bound he is bound in a practical sense because the pending case may result in denial of essential railroad service). *See also* WRIGHT & MILLER, *supra* note 7, § 1903 at 236, § 1907 at 252.

62. Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961). For a general discussion of this case and the res judicata requirement see WRIGHT & MILLER, *supra* note 7, § 1903, at 236, § 1907, at 250-51 and Shreve, *supra* note 8, at 904-05.

63. WRIGHT & MILLER, *supra* note 7, § 1903. *See also* FED. R. CIV. P. 24 advisory committee's note; 3B J. MOORE, FEDERAL PRACTICE ¶ 24.07[1] (1985); Kennedy, *supra* note 53, at 336; Shreve, *supra* note 8, at 905.

be bound by the judgment in the action and could not intervene. If the party's interest was adequately represented, however, it would not be able to satisfy the second half of the test set out in Rule 24(a)(2).[64] In order to deal with this problem, the 1966 amendment left out any reference to being "bound by a judgment," thereby eliminating the dilemma caused by the Supreme Court's res judicata requirement.[65]

As a result of these various changes, the amended rule is significantly different from the 1938 rule in several respects. First, there is no longer a distinction between cases involving property and other cases.[66] Second, adequate representation defeats intervention in all cases. Finally, when the court deems representation inadequate, intervention of right is proper whenever the applicant meets the interest and impairment requirements of the rule.[67]

The history of intervention practice shows that intervention developed as a device through which the courts can keep their deliberations from injuring third parties.[68] The practice began with situations in which injury was most likely to occur — when a third party claimed physical property or money in the control of the court and the third party would be bound by the ongoing litigation.[69] Modern intervention practice, embodied in the 1966 amendment to Rule 24, continues to develop intervention as a protective device[70] by liberalizing the requirements for intervention in response to the changing nature of civil litigation.[71] Rather than being a private dispute between opposing parties over a matter of limited concern, civil litigation today generally reflects an increasing concern with questions of broad social importance and a corresponding flexibility in the number of parties that courts will allow into a single suit.[72] This flexibility reflects a growing sense that the effects of civil litigation are not always confined to the original parties to a lawsuit.[73] In turn, this realization has led both to liberalized

64. WRIGHT & MILLER, *supra* note 7, § 1903, at 236.

65. "[T]he deletion of the 'bound' language . . . frees the Rule from undue preoccupation with strict considerations of res judicata." FED. R. CIV. P. 24 advisory committee's note. *See also* JAMES & HAZARD, *supra* note 38, § 10.19 who state that one purpose of the 1966 amendment was to do away with the "absurdity" of the res judicata requirement. *Id.* at 513.

66. The distinction is done away with by combining former clauses (a)(2) and (a)(3) into the current (a)(2). WRIGHT & MILLER, *supra* note 7, § 1903.

67. WRIGHT & MILLER, *supra* note 7, § 1907, at 249-50.

68. Moore & Levi, *supra* note 26, at 573.

69. *Id.*

70. *Id.*

71. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976).

72. Jones, *supra* note 4, at 40-41. Jones states that present day litigation is no longer related to the traditional model of a lawsuit. Instead, according to Jones, modern civil litigation is "a vehicle for the reordering of vast areas of the public interest." *Id.*

73. Chayes, *supra* note 71, at 1289.

intervention under Federal Rule 24[74] and to an increased emphasis on the practical consequences of its denial.[75]

III. Modern Intervention Practice

A. Policy Considerations and the "Interest" Requirement for Intervention of Right

Both courts and scholars advance policy arguments for liberalizing intervention practice. The first of these arguments states that intervention is a protective device designed to prevent injury to third parties whose interests are closely connected to the matter being litigated.[76] Protecting third parties has historically been a major policy concern of intervention[77] and, with the modern trend toward expanding civil litigation beyond purely private concerns, this protective function has become increasingly important.[78] Seen from this point of view, the basic question in any application for intervention revolves around fairness — is it fair to deny a non-party the opportunity to influence ongoing litigation if that party will be required to live with the result?[79]

To answer this question, courts deciding intervention petitions must consider two aspects of the third party's interest. First, the court must consider the precise effects that the litigation will have on the applicant. Second, the court should review the availability and appropriateness of any alternative means by which the non-party could protect its interests.[80] Us-

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74. Chayes, *supra* note 71, at 1290. *See also* Jones, *supra* note 4, at 41. Arguing for a continuation of this trend in the procedural rules Jones states "rather than longing for a simpler day when lawsuits were uncomplicated and trying to restrict our civil procedure accordingly, judges and advocates should recognize the present role of courts as public law arbiters and adjust procedural mechanisms to accommodate this rule." *Id.*

75. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1229 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 405 (1967). Cohn states that an early draft of the 1966 amendments included language indicating that the applicant's ability to protect his interest must be "substantially" impeded by the action. The reason that this language was dropped, Cohn suggests, was to keep the courts from viewing the requirement too narrowly and thus overlooking necessary practical considerations. Cohn, *supra* at 1232.

76. Jones, *supra* note 4, at 42.

77. *See supra* text accompanying notes 68-75.

78. Jones, *supra* note 4, at 42. Jones states that "[a]lthough protecting the interest of outsiders was a major theme underlying the early grants of intervention, it has become even more important today. In public law litigation, with its frequent objective of reordering prominent social policies and institutions, non-parties must be protected from the ever-widening impact of such lawsuits." *Id.*

79. Shreve, *supra* note 8, at 910.

80. *Id.* Shreve states that an examination of the potential adverse consequences to the applicant is necessary because these consequences are "the measure of his [the applicant's] need to intervene." Continuing, Shreve suggests that this examination should consider "the

ing these criteria, intervention should be allowed if it will prevent the effects feared by the applicant or if no other appropriate means to protect the applicant's interest exists.[81]

A second policy argument is that intervention serves the goal of judicial economy by consolidating related issues and by allowing all parties potentially concerned with the outcome of a suit to come before the court in one action.[82] Accordingly, intervenors may be welcomed by the court when their inclusion would prevent examination of the same issues in future litigation.[83] The courts may also welcome intervention when the proposed intervenor can expand the information available to the court, consequently promoting a more equitable adjudication of the problems at hand.[84]

Although attitudes today generally favor intervention,[85] several policy concerns still support an argument against increasing the number of parties allowed into one suit. For example, while one policy argument often given in favor of intervention is that it increases judicial economy,[86] a countervailing argument can be made that intervention actually decreases this economy. This argument focuses on the delay that inevitably results from

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precise effects feared from the litigation, the value or tangibility of the interests asserted to be endangered, the existence and relative desirability of alternative means, if any, to protect the applicant's interests, and perhaps the applicant's financial ability to commence his own suit." *Id.* For a further discussion of these concerns see *supra* notes 1-9.

81. *Id.*

82. Jones, *supra* note 4, at 42; Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978). The basic question in considering the effect of intervention on judicial economy is whether the court is better served by complex litigation now or by the possibility of additional litigation at a later date. J. MOORE, *supra* note 63, at ¶ 24.07[1]; Kennedy, *supra* note 53, at 330-31.

83. Brennan v. McDonnell Douglas Corp., 519 F.2d 718, 720 (8th Cir. 1975) (intervention granted because "one of the broad purposes underlying Rule 24 is the discouragement of piecemeal litigation"); Davis v. Bd. of School Comm'rs, 517 F.2d 1044, 1049 (5th Cir. 1975) (intervention allowed because it would "serve to avoid a proliferation of litigation over the same subject matter"), *cert. denied*, 425 U.S. 944 (1976). For further discussion of judicial economy see Brunet, *supra* note 82, at 719; Jones, *supra* note 4, at 42; McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976).

84. Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1346 (10th Cir. 1978) (intervention allowed because proposed intervenors will provide a "useful supplement to the defense of this case"); New York Pub. Interest Research Group v. Regents of the Univ. of New York, 516 F.2d 350, 352 (2d Cir. 1975) (allowing intervention because applicant had access to specialized factual information which it was best able to present); General Motors Corp. v. Burns, 50 F.R.D. 401, 405-06 (D. Hawaii 1970) (representation may be inadequate if party to action does not have access to relevant facts available to intervenor). *See also* Brunet, *supra* note 82, at 731 (courts may not be able to resolve controversies accurately without full consideration of the issues which intervenors can raise); Jones, *supra* note 4, at 42 (intervention often expands the information available to the court); Shreve, *supra* note 8, at 909 n.62 (interventors may "shed new light" on issues).

85. Shapiro, *supra* note 36, at 722; *see also supra* note 74.

86. *See supra* text accompanying notes 82-84.

adding additional parties, and on the increasingly burdensome litigation which may result from such additions.[87]

Another argument against intervention focuses on protecting the interests of the original parties to the litigation.[88] Although lawsuits have acquired a more public nature, there is a strong undercurrent of feeling that, since the plaintiff brings the suit, the plaintiff should have ultimate control over it.[89] Intervention, which allows a litigant not named by either of the original parties to enter the suit, is therefore said to dilute the right of the original parties to control the litigation.[90]

On a more practical note, intervention may affect the original parties by increasing litigation costs and complicating the preparation and trial of the case.[91] By taking a separate position on existing issues in the case, or by adding new claims, parties, or witnesses, an intervenor can make considerable changes in the suit. Through these changes, the intervenor may defeat the original parties' expectations of a prompt resolution to their dispute.[92]

These competing policy considerations[93] suggest the need for a balanc-

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87. Shreve, *supra* note 8, at 909. *See also* McCoid, *supra* note 83, at 707 (discussing generally the problems of multiple suits versus the problems of combining all parties into one suit).

88. Kennedy, *supra* note 53, at 330. Kennedy states that, since these parties are bearing most of the litigation costs, their interest should be protected, including respecting their attorneys' choices regarding the scope of the controversy. *Id. See also* Shreve, *supra* note 8, at 908 (discussing generally the effect of intervenors on the original parties to the suit).

89. Kennedy, *supra* note 53, at 330; Shreve, *supra* note 8, at 908.

90. J. MOORE, *supra* note 63, ¶ 24.07[1], at 24-51 (as the absolute right of the applicant for intervention is expanded, the rights of the original parties to control the litigation are diminished); Shreve, *supra* note 8, at 908 (intervention forces original parties to give up part of the management of the case).

91. Hilliker, *supra* note 13, at 23 (an intervenor may delay the trial through injecting new issues or stressing a complicated factual issue which the present parties tended to ignore). *See also* Kennedy, *supra* note 53, at 330; Shreve, *supra* note 8, at 908.

92. Shreve, *supra* note 8, at 908. *See also* Stadin v. Union Electric Co., 309 F.2d 912, 920 (8th Cir. 1962) (intervenors bringing in new information also bring in added complexity, including "the inevitable problems attendant upon additional witnesses, interrogatories and depositions; expanded pretrial activity; greater length of trial; and elements of confusion."), *cert. denied*, 373 U.S. 915 (1963); Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1943) in which the court stated that "[a]ddtional parties always take additional time. Even if they have no witnesses of their own, they are a source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair." *Id.*

93. These policy considerations are well summed up by Brunet, *supra* note 82, who states:

> Intervention can affect the efficiency or decisionmaking accuracy of a single case in a variety of ways, not all of them beneficial. The information input of intervenors can help the court's factfinding and law determination and thus enrich the quality of litigation. The addition of intervenors can also improve the quality of adversary dispute resolution because the new party possesses a special stake in the outcome. On the other hand, inter-

ing test to accommodate the totality of concerns involved in any one lawsuit.[94] Indeed, the Federal Rules provide for such a balancing in Federal Rule 24(b), the permissive intervention provision.[95] Nonetheless, by providing for intervention of right, the Federal Rules also recognize that in some situations intervention's protective function should be paramount and intervention should be automatic.[96] Because the line between these two situations is far from clear, some commentators have suggested completely eliminating intervention of right.[97] Such a suggestion, however, denigrates the protective function of intervention.[98] A better solution is to focus on the requirements that Rule 24(a)(2) sets forth and that must be satisfied before a non-party may be allowed to intervene of right.

In order to satisfy Rule 24(a)(2), a party seeking to intervene of right must fulfill three requirements.[99] To satisfy the rule the third party appli-

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vention, like other joinder devices, can greatly complicate litigation by introducing new issues. Intervention may also delay the case longer than the time required to resolve the intervenor's independent litigation. Added complexity can adversely affect the quality of the litigation, and added delay may mean a net increase in queuing costs.

Id. at 720.

94. Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) stating that "[t]he decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending." *Id.*; Atlantis Dev. Corp. v. United States, 379 F.2d 818, 824 (5th Cir. 1967) advocating balancing by stating:

> [T]here are competing interests at work in this area. On the one hand, there is the private suitor's interest in having his own lawsuit subject to no one else's direction or meddling. On the other hand, however, is the great public interest, especially in these explosive days of ever-increasing dockets, of having a disposition at a single time of as much of the controversy . . . as is fairly possible consistent with due process.

Id. The general argument made in favor of balancing is that the 1966 amendment to Rule 24 was intended not only to clarify the problem of requiring potential intervenors to be "bound by the judgment," see *supra* text accompanying notes 61-65, but to better coordinate the requirements of Rule 24 with those of Rule 19, which implicitly provides for balancing. Taking this approach are: J. MOORE, *supra* note 63, ¶ 24.07[1], at 24-52; Kennedy, *supra* note 53, at 343-44; and Shreve, *supra* note 8, at 915-16.

95. The language in Rule 24(b) which provides for such a balancing approach states that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the right of the original parties." FED. R. CIV. P. 24(b)(2).

96. Jones, *supra* note 4, at 47. In rejecting the possibility of a balancing approach for intervention of right Jones states that Rule 24(a)(2) "contains no language which could be construed to permit, let alone recommend, balancing the intervenor's interest against possible prejudice to the original parties or injecting considerations of judicial efficiency." *Id.* at 56.

97. Shreve, *supra* note 8, at 924-25. *See also* Kennedy, *supra* note 53, at 375-80 (setting forth proposed amendment to Rule 24); Shapiro, *supra* note 36, at 758-59 (arguing against expansion of intervention of right).

98. Jones, *supra* note 4, at 56 (intervention's purpose is to protect absentees).

99. In addition, an application for intervention must be timely. *See* FED. R. CIV. P. 24.

cant must first claim an "interest relating to the property or transaction which is the subject of the action";[100] and second, a potential impairment of that interest by the outcome of the suit.[101] Third, the applicant must show that the original parties to the litigation do not adequately represent the applicant's interest.[102] When a third party's application satisfies these three requirements, the application is deemed to present a case strong enough to require intervention in the ongoing litigation.[103]

The courts have not interpreted Rule 24(a)(2) as insisting that these requirements all be considered at once. Many courts see fulfilling the first requirement — establishing a sufficient interest in the litigation — as a threshold test.[104] Using this analysis, the third party must meet this requirement before the others can be considered.[105] Consequently, a court's analysis of a non-party's interest may begin and end with this requirement if the applicant's interest is deemed insufficient. If the interest is found to be sufficient, however, the analysis turns to the second requirement, the effects of

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100. FED. R. CIV. P. 24(a)(2).

101. Although clearly separable into two requirements, for purposes of convenience the existence of an interest and that interest's impairment are frequently combined into one requirement. Trbovich v. United Mine Workers, 494 U.S. 528, 538 (1972) ("Rule 24(a)(2) gives one a right to intervene if (1) he claims a sufficient interest in the proceedings and (2) that interest is not 'adequately represented by existing parties' "); Jones, *supra* note 4, stating that "[w]hile the text of rule 24 reflects the premise that interest and interest impairment may be treated as separable factors, the two concepts are almost unavoidably intertwined." *Id.* at 57.

102. Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 352 (9th Cir. 1974) (applicant must show interest, impairment, and inadequate representation); General Motors Corp. v. Burns, 50 F.R.D. 401, 403 (D. Hawaii 1970) (third party has right to intervene if it "clears three hurdles: interest, practical impairment, and inadequate representation"); Note, *supra* note 1, at 1176 (three factors are prerequisites to intervention of right: "an interest in the subject matter of the lawsuit, the potential for impairment of that interest, and the inadequate representation of that interest by existing parties.").

103. WRIGHT & MILLER, *supra* note 7, § 1902, at 231. *See also* Shreve, *supra* note 8, at 896, who states that "[i]ntervention of right is a conceptual device that identifies the more deserving applications for intervention and vouchsafes them through the gauntlet of party objections and trial court concerns by which less deserving applications — those made on permissive intervention grounds — will be judged and perhaps rejected." *Id.*

104. *See, e.g.*, Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) (the interest requirement should be "viewed as a prerequisite rather than relied upon as a determinative criteria for intervention."). *See also* Hilliker, *supra* note 13, at 21 (establishing an interest is only the first step in establishing the right to intervene).

105. Kennedy, *supra* note 53, at 351, stating that:

> The question as to the practical effect on the interest of the applicant cannot properly be answered until the interest of the applicant is first analyzed and determined. Analysis may end with the conclusion that the applicant has an insufficient interest. If he has a sufficient interest, the question then becomes: what impact will the disposition of this case have on that interest?

Id.

the ongoing litigation on that interest.[106]

The interest requirement serves several functions in intervention analysis. By requiring that the applicant establish an interest in the suit, the requirement guarantees that the non-party is concerned with the outcome of the ongoing litigation and has the same incentive to succeed that characterizes the original parties.[107] Similarly, since it requires that an applicant's interest be impaired by the litigation, the interest requirement also limits intervention to non-parties who are truly affected by the ongoing proceedings.[108] In this way the requirement restricts what some commentators feared would be a flood of intervenors stemming from liberalizing the intervention provisions.[109] Overall, the interest requirement serves to test the proposed intervenor's commitment to the litigation at hand. By requiring that the litigation directly affect the applicant, the interest requirement provides the incentive to proceed — the essence of the adversary model of litigation.[110]

Courts have not yet determined just what connection to an ongoing lawsuit will satisfy the interest requirement.[111] The language of Federal

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106. Kennedy, *supra* note 53, at 351. *See supra* notes 99-103.

107. Brunet, *supra* note 82, at 722. *See also* Utah v. American Pipe & Constr. Co., 50 F.R.D. 99, 102 (C.D. Cal. 1970) (right to intervene arises only when the prospective intervenor has a sufficient stake in the outcome), *aff'd*, 414 U.S. 538 (1974).

108. Brunet, *supra* note 82, at 722.

109. Friedenthal, *Increased Participation by Non-Parties: The Need for Limitations and Conditions*, 13 U.C. DAVIS L. REV. 259 (1980). Friedenthal expresses the fear that liberalized intervention procedures will change the adversary nature of the judicial system by making courts into "quasi-legislative bodies." *Id.* at 261.

110. Brunet, *supra* note 82, at 720-22. Brunet summarizes the functions of the interest requirement by stating:

> Federal intervention criteria should support the incentive concepts essential to the adversary model.
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> . . . .
>
> [T]he policies advanced by each of the intervention criteria appear quite consistent with the dynamics of the adversary model. The interest requirement guarantees concern with the outcome of the litigation, and the potential harm associated with the impairment requirement should increase this concern. The interest and impairment requirements ensure that the applicant possesses the same incentive to succeed that characterizes the original parties to an adversary lawsuit. The inadequacy of representation requirement serves to exclude applicants in complete partnership with an existing party in the case. The applicant's independence produces concern and an unwillingness to rely completely on another party's adversary incentive to succeed.

Id.

111. Coca-Cola Bottling Co. v. Coca-Cola Co., 98 F.R.D. 254, 280-81, n.68 (D. Del. 1983) (although interest is easily defined when specific property is involved, it is more difficult in other cases); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (there is no precise definition of what constitutes a litigable interest for purposes of Rule 24(a)(2)); Rosebud Coal Co. v. Andrus, 644 F.2d 849, 850 (9th Cir. 1981) (the interest requirement in the rule is vague). *See also* WRIGHT & MILLER, *supra* note 7, § 1908, at 263; Jones, *supra* note 4, at 58.

Rule 24 also fails to give a clear definition of the test.[112] As a result, the courts have developed two schools of thought on intervention, resulting in inconsistent decisions in cases that involve petitions to intervene.[113]

B. The Current Meaning of "Interest" and Its Effect on Environmental Groups

In keeping with the modern trend toward more inclusive civil litigation, the 1966 amendment to Rule 24 liberalized intervention requirements and focused on the practical consequences of its denial.[114] Taking this approach, many courts now give a liberal reading to the interest requirement, abandoning formal, legalistic restrictions and emphasizing the practical aspects of intervention in particular factual situations.[115] Other courts, however, continue to read the rule's interest requirement conservatively, guided by historical policies which require an interest recognized and supported by law in order to support intervention of right.[116] This dichotomy is further emphasized by two Supreme Court decisions which fail to agree on a consistent interpretation of the interest requirement.

1. Liberal Interpretation of the Interest Requirement

The leading liberal interpretation of the interest requirement is *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*,[117] in which the Supreme Court permitted intervention in order to allow a third party affected by a settlement agreement to protest that agreement.[118] Although

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112. WRIGHT & MILLER, *supra* note 7, § 1908, at 270 ("[t]he term in the rule itself is quite unilluminating."). *See also* Jones, *supra* note 4, at 56-57 stating that "Rule 24(a)(2) begs the question: How great need the risk of impairment be, and for what type of interest, to satisfy the rule?" *Id.*

113. C. WRIGHT, *supra* note 46, § 75 (there is no consistent pattern to definitions of interest under the amended rule); Note, *supra* note 1, at 1176 (differences in interpretation of the rule have resulted in contradictions and confusion in the case law). *See also* cases cited *infra* notes 117-52.

114. *See supra* text accompanying notes 68-75.

115. Cohn, *supra* note 75, at 1229 (the amendments abandon formal, legalistic restrictions and utilize pragmatic solutions that guarantee fairness); Note, *supra* note 34, at 124.

116. WRIGHT & MILLER, *supra* note 7, § 1908; Kaplan, *supra* note 75, at 405; Note, *supra* note 34, at 120-21.

117. 386 U.S. 129 (1967).

118. In *Cascade*, the Supreme Court had held in an earlier decision that the acquisition of one gas pipeline company by another violated the Clayton Act and had ordered divestiture. Following that Supreme Court ruling, the Attorney General negotiated a settlement with the companies involved and the District Court approved the settlement. Several would-be parties moved to intervene at this stage because they felt that the settlement was inconsistent with the Supreme Court's earlier decision and adverse to their interests. Of these potential intervenors, two were allowed to intervene of right under former Rule 24(a)(3) and one under new Rule 24(a)(2) since, between the time of the initial divestiture decision in 1964 and the time of the

the value of *Cascade* as precedent has been questioned, criticism is most often aimed at the Court's interpretation of the adequacy of representation requirement, not at its interpretation of interest.[119] The liberal interpretation of interest in *Cascade*, therefore, remains a viable approach, and one which is often taken by the lower federal courts.

In general, the courts that construe the interest requirement liberally make their decisions based on several common assumptions. First, these courts emphasize the protective function of intervention and focus on the practical effect to the third party of permitting or denying intervention.[120] These courts generally reject the idea that, in order to intervene, the proposed intervenor must have a specific legal or equitable interest.[121] Instead, according to the liberal courts, the standard should be practical rather than formalistic.[122]

Cascade decision in 1966, Rule 24 had undergone the amendments of 1966. The party allowed to intervene under the new rule, Cascade Natural Gas Corp., was a distributor of gas solely supplied by one of the two original pipeline companies. Cascade claimed that the proposed settlement agreement would be unfair to the new company formed by the divestiture and would prevent the new company from performing in the future, a situation which Cascade claimed affected its economic interests. The majority in *Cascade* agreed and found that new Rule 24(a)(2) was broad enough to include Cascade's interest.

119. WRIGHT & MILLER, *supra* note 7, § 1908, at 266-67.

120. *Cascade*, 386 U.S. at 136; Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (allowing parents of school children to intervene in a desegregation suit to protect their interests in the education of their children); Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) (holding that a state banking commissioner had an adequate interest in the constitutionality of the federal act controlling branching of national banks to justify intervention).

121. Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967). *Nuesse* is one of the leading liberal interpretations of the interest requirement. In this case the Wisconsin state banking commissioner sought to intervene of right in an action brought by a Wisconsin state bank seeking to prevent a national bank from opening a branch in its vicinity in violation of state branch banking laws. In allowing intervention, the court specifically rejected the idea that Rule 24 requires a "specific legal or equitable interest" holding instead that "a more instructive approach is to let our construction be guided by the policies behind the 'interest' requirement." *Id.* at 700. *See also* Blake v. Pallan, 554 F.2d 947, 952 (9th Cir. 1977) (stating that the Ninth Circuit has rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest); New York State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc., 34 Fed. R. Serv. 2d 1377 (W.D.N.Y. 1982) which held, in an action in which the Sierra Club sought to intervene in a suit questioning the safety of a nuclear waste processing facility operated by the defendant, that "[the defendant's] contention that one must have a legal right to seek the relief demanded in order to intervene of right under Rule 24(a) cannot stand as an absolute proposition. It is clear that the requirement that for intervention under Rule 24(a) one must have 'a significantly protectable interest' . . . in the subject of the property or transaction cannot be taken to mean that one must have 'a specific legal or equitable interest in the close.' " (citations omitted) *Id.* at 1378; California v. Bergland, 29 Fed. R. Serv. 2d 144 (E.D. Cal. 1979) (holding that, when environmental groups sought to intervene in a suit questioning action by the United States Forest Service, the test for impairment should be practical, not legal, impairment).

122. United States v. Hooker Chemicals & Plastics Co., 749 F.2d 968 (2d Cir. 1984). In a lengthy analysis of interest under Rule 24(a)(2) the court concluded that the 1966

In keeping with this emphasis on practicality, liberal courts generally view the interest requirement as a threshold test.[123] From this perspective, if a proposed intervenor can be said to have any cognizable interest in the suit he will be held to have satisfied this part of the interest requirement.[124] After finding that a proposed intervenor has such an interest, the court should take a balancing approach to the questions of impairment of that interest and inadequacy of representation. Accordingly, as the proposed intervenor's interest in the suit increases, the need to demonstrate impairment

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amendment "focused on abandoning formalistic restrictions in favor of 'practical considerations' to allow courts to reach pragmatic solutions to intervention problems" and therefore the rule, as amended, is a "nontechnical directive to courts that provides the flexibility necessary to cover the multitude of intervention situations." *Id.* at 983.

For other cases stating this proposition see Sagebrush Rebellion v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (Rule 24 was amended in 1966 to permit courts to look at practical considerations); Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978) (Rule 24 refers to impairment in a practical sense, therefore there is no limitation to strictly legal consequences); Natural Resources Defense Council v. Costle, 561 F.2d 904, 909 (D.C. Cir. 1977) (allowing industries to intervene in an action over promulgation of Environmental Protection Agency regulations, even though they could later bring suit to challenge the regulations if they were promulgated, because it was more practical for them to be involved in developing the regulations than to challenge them later).

123. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). In *Smuck*, the trial court entered a desegregation order against the District of Columbia schools and the board of education decided not to appeal the decision. However, several interested parties did want to pursue the case and three of them, the resigned superintendent of schools, a board of education member, and parents of certain school children sought to intervene in the action for purposes of appealing the decision. In deciding the question of the propriety of the parent's intervention the court stated that:

> [T]he first requirement of Rule 24(a)(2), that of an 'interest' in the transaction, may be a less useful point of departure than the second and third requirements, that the applicant may be impeded in protecting his interest by the action and that his interest is not adequately represented by others.
>
> This does not imply that the need for an 'interest' in the controversy should or can be read out of the rule. But the requirement should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention.

Id. at 179. *See also* County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) which stated that "[t]he interest test is basically a threshold one, rather than the determinative criterion for intervention, because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene." *Id.* at 438; United States v. Reserve Mining Co., 56 F.R.D. 408, 412 (D. Minn. 1972) (concluding that the interest requirement of Rule 24(a)(2) is a prerequisite to intervention).

124. United States v. Stringfellow, 39 Fed. R. Serv. 2d 439 (C.D. Cal. 1984), *rev'd*, 783 F.2d 821 (9th Cir.), *cert. granted in part*, 106 S. Ct. 2273 (1986), *vacated on other grounds* 107 S. Ct. 1177 (1987). The *Stringfellow* court held that, in deciding an environmental organization's ability to intervene in an action to stop releases of hazardous substances from a hazardous waste dump, the applicants "need only show that they have a 'protectable' interest in the outcome of the litigation to warrant inclusion in the action." *Id.* at 445.

of that interest and inadequate representation decreases, and vice versa.[125]

After the court has made this threshold determination of interest the importance of the emphasis on practicality becomes apparent. Under old Rule 24, when a court considered a third party's claim that the party's interest would be impaired by the outcome of ongoing litigation, the court was precluded from finding impairment unless the court's decision in the ongoing suit would bind the proposed intervenor as a matter of res judicata.[126] Under the new rule, the third party need not be bound by the judgment in ongoing litigation to have its interest impaired.[127] Instead, the court may find that a proposed intervenor's interest has been impaired if the court's decision will merely set a precedent which could have an adverse effect on the third party.[128]

Courts that interpret interest liberally also share a concern for increasing judicial economy by consolidating as many issues and parties in one suit as possible.[129] Viewing the existence of an interest as a threshold require-

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125. United States v. Hooker Chemicals and Plastics Co., 749 F.2d 968, 983 (2d Cir. 1984). The *Hooker Chemicals* court stated that:

> The various components of the rule are not bright lines, but ranges . . . Application of the rule requires that its components be read not discretely, but together. A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser showing of interest may suffice as a basis for granting intervention.

Id. at 983. *See also* United States v. American Telephone and Telegraph, 642 F.2d 1285, 1291 (D.C. Cir. 1980) (whether proposed intervenor's interest is in "the subject of the action" requires a flexible determination of "action"); Natural Resources Defense Council v. Costle, 561 F.2d 904, 910 (D.C. Cir. 1977) (intervention allowed because of proposed intervenor's strong showing of practical impairment).

126. *See supra* text accompanying notes 60-64.

127. *See supra* text accompanying notes 60-64.

128. New York Public Interest Research Group v. Regents of the Univ. of New York, 516 F.2d 350 (2d Cir. 1975) (allowing intervention by a pharmaceutical association in an action brought by consumers seeking to enjoin the Regents from enforcing a regulation prohibiting price advertising of drugs because the stare decisis effect of an adverse decision would cause significant changes in the profession and therefore an adverse impact on the interests of the organization); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967) (a nonparty claiming an interest in property which was the subject of a trespass action successfully argued that the stare decisis effect of an adverse decision would satisfy the impairment prong of the interest test). *See also* Jones, *supra* note 4, stating that "[t]he recognition of stare decisis as a source of impairment . . . is entirely consistent with the emerging public interest model of litigation which recognizes that the indirect effects of an action may substantially impair the rights of a large number of nonparties." *Id.* at 59-60. *But see* Francis v. Chamber of Commerce, 481 F.2d 192, 195 n.8 (4th Cir. 1973) (stare decisis acts as impairment only in "proper cases"); *In re* Penn Central Commercial Paper Litigation, 62 F.R.D. 341, 347 (S.D.N.Y. 1974) (persuasive effect of judgment on court of equal rank not enough to qualify as impairment sufficient to permit intervention), *aff'd without opinion*, 515 F.2d 505 (2d Cir. 1975).

129. *See* Comment, *Intervention As It May Effect Environmental Settlement Agreements*, 18 NAT. RESOURCES J. 679, 685 (1978) (the relaxed standard serves to protect all

ment, these courts conclude that one of the requirement's primary functions is to serve as a practical test for consolidating potential lawsuits.[130] Accordingly, the more liberal courts generally state that if the third party asserts a reasonable interest, and can meet the rule's other requirements, the party should be allowed to enter the ongoing litigation in order to prevent multiple suits and to promote judicial efficiency.

Overall, the liberal courts look primarily to what they see as the objectives of the 1966 amendment to Rule 24 — protecting third parties by liberalizing intervention and promoting judicial economy by consolidating issues and parties.[131] From this perspective, while the interest requirement still serves the function of showing that the third party is sufficiently connected to the lawsuit to adequately represent its asserted interest, satisfying that requirement takes only a minimal connection with the ongoing litigation.[132] Because these courts generally do not work under a preconceived notion of what constitutes an acceptable interest,[133] they have been receptive to the claims of environmental groups. Specifically, liberal courts gave credence to environmental interests when they permitted the Audubon Society to intervene in a suit challenging the Secretary of the Interior's creation of a wildlife conservation area;[134] granted fifteen motions to intervene, many by environmental groups, in a suit over Reserve Mining Company's disposal of taconite waste in Lake Superior;[135] and recognized that environmental groups had an interest in a suit over the disposal of hazardous waste on a four acre landfill on the Niagara River.[136]

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interested parties and to encourage judicial efficiency by avoiding the need for later litigation).

130. Cook v. Boorstin, 763 F.2d 1462, 1470 (D.C. Cir. 1985) (allowing intervention by thirty-one applicants to prevent filing of separate actions); Natural Resources Defense Council v. Costle, 561 F.2d 904, 911 (D.C. Cir. 1977) (the practicality of filing a second lawsuit may be sufficient impairment); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (interest test is a practical guide to disposing of lawsuits by involving as many concerned persons in one suit as possible).

131. *See supra* text accompanying notes 76-84.

132. *See supra* text accompanying notes 123-24.

133. WRIGHT & MILLER, *supra* note 7, § 1908, at 278, 280.

134. Sagebrush Rebellion v. Watt, 713 F.2d 525 (9th Cir. 1983).

135. United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972).

136. United States v. Hooker Chemicals & Plastics Co., 749 F.2d 968 (2d Cir. 1984). For other cases construing interest liberally see Southeast Alaska Conservation Council, Inc. v. Watson, 35 Fed. R. Serv. 2d 1255 (9th Cir. 1983) (allowing fishermen to intervene in a suit brought by environmentalists because of fishermen's special knowledge and information); Washington State Bldg. & Constr. Trades v. Spellman, 684 F.2d 627 (9th Cir. 1982) (allowing public interest group to intervene in suit challenging constitutionality of initiative prohibiting transportation and storage of hazardous waste in Washington), *cert. denied*, 461 U.S. 913 (1983); Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980) (allowing the National Organization of Women to intervene in an action challenging procedures for ratification of the Equal Rights Amendment); County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) (citizen group wishing to purchase land in a reclamation area allowed to intervene in an action challenging enforcement of statutory requirements affecting sale of such land); Fleming v.

2. Conservative Interpretation of the Interest Requirement

In contrast to the liberal interpretation of interest in *Cascade*,[137] in *Donaldson v. United States*[138] the Supreme Court viewed the requirement narrowly. Here the Court stated that "[w]hat is obviously meant [by the rule's language] is a significantly protectable interest,"[139] but failed to define what such an interest might be. The *Donaldson* decision thereby provides little guidance for subsequent intervention decisions, leaving open the split between liberal and conservative interpretations of the interest requirement.[140] Therefore, despite the liberalized nature of the 1966 amendment language and the liberal interpretation of the rule given by some lower federal courts,[141] a significant number of lower courts continue to construe the interest requirement conservatively.

Although *Donaldson* failed to define "significantly protectable interest," in general in the conservative courts a third party must show a direct, specific, and legal interest in the ongoing litigation in order to intervene.[142]

Citizens for Albemarle, Inc., 577 F.2d 236, 238 (4th Cir. 1978) (allowing intervention by citizen groups in suit challenging refusal of rezoning for development because citizen groups' fears regarding development's effect on water quality were "not without reason"), *cert. denied*, 439 U.S. 1071 (1979); United States v. City of Niagara Falls, 103 F.R.D. 164 (W.D.N.Y. 1984) (permitting unincorporated group of businesses that sent waste to a treatment plant to intervene in suit challenging plant's compliance with the Clean Water Act); Environmental Defense Fund v. Costle, 79 F.R.D. 235 (D.D.C. 1978) (allowing intervention by groups concerned with consumption of Colorado River water in suit over the Environmental Protection Agency's regulation of river's salinity).

137. 386 U.S. 129 (1967); *see supra* note 118.

138. 400 U.S. 517 (1971).

139. *Donaldson*, 400 U.S. at 532. In *Donaldson*, the IRS, in the process of investigating Donaldson's tax liability, served subpoenas on Donaldson's former employer and the employer's accountant in an attempt to have them produce records reflecting payments to Donaldson. A summary proceeding was initiated to enforce compliance with the subpoenas and Donaldson sought to intervene to avoid disclosure of the records. The court held that Donaldson did not have an interest in the records sufficient to permit intervention of right, pointing out that these records were the routine business records of Donaldson's employer and thus were subject to no claims of privilege. Donaldson's only interest, therefore, was in any significance which those records might have for income tax purposes, and the Court held that "[t]his interest cannot be the kind contemplated by Rule 24(a)(2). . . .[W]hat is obviously meant there is a significantly protectable interest." *Id.* at 532.

140. WRIGHT & MILLER, *supra* note 7, § 1908. WRIGHT & MILLER state that:

> '[S]ignificantly protectable interest' has not been a term of art in the law and there is sufficient room for disagreement about what it means so that this gloss on the rule is not likely to provide any more guidance than does the bare term 'interest' used in Rule 24 itself.

Id. at 270.

141. *See supra* notes 117-36.

142. Note, *supra* note 1, at 1176. For a sampling of cases taking this view see *infra* notes 149-52. *See also* Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir.) (even though intervention should be tested by practical considerations a legally protectable interest is

In contrast to the liberal courts, these conservative courts see any post-amendment liberalization in the rule as primarily affecting the impairment requirement through elimination of the "bound by the judgment" wording of former Rule 24(a)(2).[143] These conservative courts conclude that the nature of the interest required by Rule 24 has not changed, and that the nature of the claimed interest can determine the third party's right to intervene.[144] Rather than balancing the nature and extent of the third party's interest against other intervention requirements, these courts generally state that they will not allow intervention unless they deem the proposed intervenor's interest to be significant and legally protectable.[145] Because of their strict interpretation of interest, these courts focus on protecting the original parties rather than on protecting third parties. As a result, the interests of the original parties will prevail unless the third party's interest can rise to a specific level.[146] This test—requiring that a proposed intervenor's interest

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still required), *cert. denied*, 400 U.S. 878 (1970); Toles v. United States, 371 F.2d 784, 786 (10th Cir. 1967) ("interest" means a "specific legal or equitable interest in the chose"); *In re* Penn Central Commercial Paper Litigation, 62 F.R.D. 341 (S.D.N.Y. 1974) ("[A]n interest, to satisfy the requirements of Rule 24(a)(2), must be significant, must be direct rather than contingent, and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit."), *aff'd without opinion sub. nom.* Schulman v. Goldman, Sachs and Co., 515 F.2d 505 (2d Cir. 1975).

143. Kennedy, *supra* note 53, at 346. *See also* WRIGHT & MILLER , *supra* note 7, § 1908.

144. *Compare* Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977) (allowing intervention because the proposed intervenors asserted an interest in property which qualified as direct and substantial) *and* Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir. 1970) (allowing intervention because proposed intervenor asserted an interest in property), *cert. denied*, 400 U.S. 878 (1970) *with* Commonwealth Edison Co. v. Train, 71 F.R.D. 391 (N.D. Ill. 1976) stating "[i]t is alleged that the N.R.D.C.'s [Natural Resources Defense Council's] members have significant, judicially protectable interests in the aesthetic, conservational and recreational as well as economic quality of the water which the regulations seek to protect. These interests do not rise to the level of a direct, substantial, legally protectable interest in the proceedings." *Id.* at 393. *See also* Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316 (S.D. Fla. 1973) stating that even if the proposed intervenor could show "that his interests in the environment were related to this action, such an interest is not a direct, substantial or legally protectable interest." *Id.* at 321.

145. Donaldson v. United States, 400 U.S. 517, 532 (1971); Meridian Homes Corp. v. Nicholas W. Prassas and Co., 683 F.2d 201 (7th Cir. 1982) (denying intervention of right to two brothers seeking to intervene in a suit to determine the status of a real estate joint venture because their interest was only in the profits of the venture and therefore indirect); Wade v. Goldschmidt, 673 F.2d 182 (7th Cir. 1982). In *Wade*, the court denied intervention to a non-profit organization seeking to intervene in a suit challenging whether the government followed proper procedures in locating a bridge over the Illinois River. The proposed intervenors asserted economic, personal, and environmental interests but the court held that these did not qualify as direct, substantial and legally protectable in this case because the subject matter of the suit was whether proper administrative procedures had been followed, not whether the location of the bridge was proper. *Id.* at 185-86.

146. By weighing the third parties' interests against those of the original parties, these courts seem to turn the test for intervention of right into the balancing test required for per-

rise to a particular, but undefined, level—gives a significant amount of discretion to courts deciding intervention questions.[147] Consequently, even among courts taking the same general approach to intervention, the cases show a disparity of results.[148]

In general, however, the conservative courts have been most receptive to traditionally recognized interests, such as interests in property,[149] and in these courts third parties asserting environmental interests have not fared well. Specifically, the conservative courts failed to recognize environmental interests as significant when they denied intervention to an environmental group challenging government action in a condemnation proceeding involving land mandated for the National Park Service;[150] the Audubon Society challenging the constitutionality of provisions of the Migratory Bird Act and the Eagle Protection Act;[151] and the Natural Resources Defense Council in a suit questioning the validity of regulations promulgated by the Environmental Protection Agency.[152]

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missive intervention. Jones, *supra* note 4, at 56. Jones states that "[i]n the absence of a well-perceived rationale for nonstatutory intervention of right, courts may be tempted to turn to the approach common where permissive intervention is sought, of balancing the prospective intervenor's interest against the potential prejudice to the original parties." *Id. See also supra* text accompanying notes 93-98.

147. Jones, *supra* note 4, at 46-47.

148. *Compare* Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977) (allowing intervention to challenge location of an abortion clinic because an interest in property is direct and substantial) *with* Fox Valley Reproductive Health Care Center v. Arft, 82 F.R.D. 181 (E.D. Wis. 1979) (denying intervention on almost the same facts as *Planned Parenthood*), *dismissed without opinion*, 622 F.2d 590 (7th Cir. 1980).

149. *See, e.g.*, Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977). In this case Planned Parenthood challenged the validity of special zoning restrictions controlling the location of an abortion clinic and a neighborhood association sought to intervene to represent their interests in surrounding property values. In allowing intervention the court stated that an interest in property is the "most elementary type of right that Rule 24(a) is designed to protect" and held that the homeowner's interest was more than "peripheral and insubstantial" and therefore was "significant and protectable," thus satisfying the requirements of Rule 24(a)(2). *Id.* at 869.

150. United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1956 (1986).

151. Allard v. Frizzel, 536 F.2d 1332 (10th Cir. 1976).

152. Commonwealth Edison Co. v. Train, 71 F.R.D. 391 (N.D. Ill. 1976). For cases not previously mentioned which have construed the interest requirements narrowly see Westlands Water Dist. v. United States, 700 F.2d 561, 563 (9th Cir. 1983) (holding that the Environmental Defense Fund could not intervene in a suit over contract rights to delivery of water); Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (10th Cir. 1981) (denying intervention to a company with an independent coal contract with the plaintiff in a suit over the Department of Interior's ability to adjust the royalty rate because the proposed intervenor's interest was not unique or direct); Piambino v. Bailey, 610 F.2d 1306, 1321 (5th Cir.) (requiring that a proposed intervenor be a "real party in interest"), *cert. denied*, 449 U.S. 1011 (1980); Piedmont Heights Civics Club v. Moreland, 83 F.R.D. 153 (N.D. Ga. 1979) (refusing to allow a non-

3. The Need for Guidelines

As a result of both the Supreme Court's and the lower federal courts' inability to develop one philosophy on what constitutes a sufficient interest for purposes of intervention, the same interests have met with different fates in different courts.[153] This is particularly obvious when comparing the successful assertion of the environmental interest in liberal courts with its unsuccessful assertion in conservative courts.[154] These disparate results clearly demonstrate the need for guidelines that courts can follow when making decisions on questions of intervention.

To be true to the purposes of the interest requirement and of the liberalized 1966 amendment, such guidelines must define a middle ground between the approach taken by the liberal and the conservative courts. Accordingly, these guidelines should preserve the liberal courts' interest in promoting judicial economy and protecting third party interests by emphasizing a balanced, practical standard over a legal interest.[155] On the other hand, to ensure that the third party is concerned with and committed to the outcome of the litigation, these guidelines should adopt the conservative courts' concept of a direct interest. The adoption should liberalize only the nature of that interest so as to extend it beyond the historically required connection to specific property.[156] Using these guidelines, Rule 24 would be interpreted to require a third party to have a direct stake in the outcome of the litigation in which it proposes to intervene, a requirement directly analogous to the injury in fact requirement of standing to bring a suit.

IV. THE INTEREST REQUIREMENT FOR INTERVENTION OF RIGHT AND THE INJURY IN FACT TEST FOR STANDING TO BRING A SUIT

A. The Development of the Injury in Fact Test

The concept of standing to sue stems from the case or controversy re-

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profit organization representing an interest in the development of the City of Atlanta to intervene in an action alleging that the Department of Transportation had not complied with federal regulations while preparing plans to increase the capacity of the interstate highway system); East Powelton Concerned Residents v. United States Dept. of Housing & Urban Dev., 69 F.R.D. 392 (E.D. Pa. 1975) (focusing on the proposed intervenor's connection to the plaintiff's purpose in bringing the suit).

153. *See supra* notes 111-13.

154. *Compare supra* notes 134-36 and accompanying text *with supra* notes 150-52 and accompanying text. *See also* United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1956 (1986) discussed *infra* at text accompanying notes 196-202.

155. *See supra* text accompanying notes 120-30.

156. *See supra* text accompanying note 142.

quirement of the Constitution.[157] In general, standing places limits on who may bring a suit in federal court[158] by requiring that the plaintiff have a "personal stake in the outcome of the controversy."[159] For purposes of standing, such a personal stake requires that the plaintiff allege a direct, palpable, and concrete injury to himself[160] and that he allege both causality[161] and redressability.[162]

Even when a plaintiff is able to satisfy these constitutional requirements, he may still lack standing due to prudential principles imposed by the judiciary.[163] Two such prudential rules are applicable to standing. First,

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157. U.S. CONST. Art. III, § 2, which provides in pertinent part:

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under this Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; —between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects.

158. Warth v. Seldin, 422 U.S. 490, 498-99 (1975) which states that "the standing question asks 'whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of Federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). *See also* 6A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 57.11 (1986); Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 647 (1973) (the question of standing can be phrased as "what sort of interest is 'sufficient' for the plaintiff to be regarded as a proper party to bring the action?").

159. This requirement is best phrased by Baker v. Carr, 369 U.S. 186 (1962) which states that, to have standing, a party must have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Id.* at 204.

160. Warth v. Seldin, 422 U.S. 490, 501 (1975) stating that "[t]he plaintiff must allege a distinct and palpable injury to himself." *See also* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) stating that plaintiff must "show that he personally has suffered some actual or threatened injury."

161. In order to satisfy the causality requirement the plaintiff must allege that the defendant's actions were the cause of his injury. *Gladstone, Realtors*, 441 U.S. at 99, stating "the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the . . . illegal conduct of the defendant."; Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978), stating "the plaintiff must show a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *See generally*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 2.12, at 74 (3d ed. 1986) [hereinafter NOWAK, ROTUNDA & YOUNG].

162. In order to meet the redressability requirement the plaintiff must allege that if the relief sought is granted the problem will be eliminated. *Gladstone, Realtors*, 441 U.S. at 100; Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976) which states "the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."

163. *Gladstone, Realtors*, 441 U.S. at 99-100, stating "[e]ven when a case falls within

the plaintiff may not assert a "generalized grievance" — he must assert an injury which is peculiar to himself or to a distinct group of which he is a part, rather than one which is "shared in substantially equal measure by all or a large class of citizens."[164] Second, the plaintiff must not assert the rights of third parties, but rather only his own interests.[165] Overall, then, in order to meet standing requirements, a plaintiff must assert a direct and palpable injury to himself.

What constitutes a direct and palpable injury has undergone change over the years. Early interpretations of this requirement held that the plaintiff must allege a "legal wrong," meaning injury to a "legal interest,"[166] before he could be said to have standing to sue. This legal interest evaded definition, however, and the circularity of its reasoning — that something is not a legal interest until the court will protect it, but the court will not protect it unless it is a legal interest — proved its downfall.[167]

In *Association of Data Processing Organizations v. Camp*[168] the Court discarded the legal interest test and established the "injury in fact" test.[169] This test is two-pronged, asking first "whether the plaintiff alleges that the

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these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks . . . to limit access to the federal courts to those litigants best suited to assert a particular claim."; J. MOORE, *supra* note 158, ¶ 57.11, at 57-92 (standing involves both constitutional and prudential considerations).

164. Warth v. Seldin, 422 U.S. 490, 499 (1975). *See also* Frothingham v. Mellon, 262 U.S. 447 (1923) stating:

> The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Id. at 488.

165. *Warth*, 422 U.S. at 499, stating "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement . . . [he] 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." *See also Gladstone, Realtors*, 441 U.S. at 100.

166. *See, e.g.*, Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137-39 (1939) (the right invaded must be a legal right); Alabama Power Co. v. Ickes, 302 U.S. 464, 479-81 (1938) (alleged wrongdoing must invade legal right of petitioner); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 932 (D.C. Cir.) (plaintiff's legal rights must have been violated), *cert. denied*, 350 U.S. 884 (1955). *See also* Scott, *supra* note 158, at 649-50; Note, *More Than an Intuition, Less Than A Theory: Toward A Coherent Doctrine of Standing*, 86 U. COL. L. REV. 564, 567 (1986) (prior to 1970 the Court required a litigant to allege injury to a legal interest).

167. C. WRIGHT, *supra* note 46, § 13, at 43. *See also* Scott, *supra* note 158, at 651; Note, *supra* note 166, at 567 (both discussing Wright's argument).

168. 397 U.S. 150 (1970).

169. Note, *supra* note 166, at 567. *See also* Sierra Club v. Morton, 405 U.S. 727, 733 (1972) (*Data Processing* holds more broadly than requiring a "legal interest" or "legal wrong"); NOWAK, ROTUNDA & YOUNG, *supra* note 161, § 2.12, at 75 ("injury in fact" replaces "legal interest"); Scott, *supra* note 158, at 662-63.

challenged action has caused him injury in fact, economic or otherwise"[170] and second, "whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[171] Over time the Court has, for practical purposes, reduced the test to a single standard — whether or not the plaintiff alleges an "injury in fact."[172]

The first decisions interpreting the injury requirement generally held that the plaintiff must have suffered an economic injury in order to qualify to bring suit.[173] This qualification was rejected in *Data Processing* when the Court specifically stated that the plaintiff must allege that he has suffered an "injury in fact, economic *or otherwise*."[174] In a subsequent decision, *Sierra Club v. Morton*,[175] the Court addressed the question of what constitutes an injury in fact.[176]

In *Sierra Club*, the plaintiff, an environmental organization, sought an injunction to prevent the Secretary of the Interior and the Secretary of Agriculture from issuing permits necessary for the construction of a resort in the Mineral King Valley near Sequoia National Park. In its complaint the plaintiff alleged that the development would "destroy . . . the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."[177] In assessing this alleged harm, the Court stated that it did not "question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing."[178] Further, the Court recognized that where such an injury was involved the prudential generalized grievance rule should not apply, stating instead that the judicial process should protect environmental interests even though

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170. 397 U.S. at 152.

171. 397 U.S. at 153.

172. NOWAK, ROTUNDA & YOUNG, *supra* note 161, § 2.12, at 75; Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 487 (1972); *see also* Barlow v. Collins, 397 U.S. 159, 172-73 (1970) (Brennan, J. and White, J. dissenting) stating that "standing exists when the plaintiff alleges . . . that the challenged action has caused him injury in fact, economic or otherwise . . . and no further inquiry is pertinent to its existence."

173. Note, *Role of the Judiciary*, *supra* note 2, at 1086-87 and Note, *Standing and Conservation Values*, *supra* note 2, at 392, both discussing generally the development of the injury in fact test and its early limitations to economic injury. *But see* Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967) and Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), both pre-*Sierra Club* cases which recognized injury to an environmental interest as sufficient for standing. *See* discussion of these cases *supra* note 2.

174. 397 U.S. at 152 (emphasis added).

175. 405 U.S. 727 (1972).

176. Scott, *supra* note 158, at 666-67.

177. 405 U.S. at 734.

178. *Id.* For a good description of what the environmental interest may encompass see Conservation Society v. Volpe, 343 F. Supp. 761 (D. Vt. 1972).

those interests might be shared by many.[179]

The *Sierra Club* decision recognized the validity of environmental injury, but did not do away with the need for the plaintiff to allege an injury to himself.[180] In fact, in subsequent decisions, the Court has maintained the integrity of the injury in fact test.[181] By continuing to require a direct injury to the plaintiff the Court has expressed continuing support for the test's purpose — to ensure that the plaintiff is committed to the litigation.[182]

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179. 405 U.S. at 734. The *Sierra Club* Court stated that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id. See also* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (allowing a student organization with the purpose of promoting environmental quality to challenge an Interstate Commerce Commission order on freight rates) and Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (allowing an environmental group, a labor union, and various individuals to challenge the Price-Anderson Act on non-economic injury grounds).

Support of the so called "ideological plaintiff," the plaintiff without an economic stake in the outcome, can also be found in Jaffe, *supra* note 2. Jaffe stated that:

> [T]he very fact of investing money in a lawsuit from which one is to acquire no further monetary profit argues, to my mind, a quite exceptional kind of interest, and one peculiarly indicative of a desire to say all that can be said in support of one's contention. From this I would conclude that, insofar as the argument for a traditional plaintiff runs in terms of the need for effective advocacy, the argument is not persuasive.

Id. at 1037-38.

180. Sierra Club v. Morton, 405 U.S. 727 (1972). The *Sierra Club* Court stated that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 734-35, and "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Id.* at 738. In this case the Sierra Club was said not to have standing because it had not alleged a direct injury to its members. *Id.* at 740-41.

181. Diamond v. Charles, 106 S. Ct. 1697, 1703 (1986) ("The presence of a disagreement . . . is insufficient by itself to meet [standing] requirement[s].") *Id.* Bender v. Williamsport Area School Dist., 106 S. Ct. 1326, 1332 (1986); Linda R.S. v. Richard D., 410 U.S. 614 (1973) which stated that "[t]he bare existence of an abstract injury meets only the first half of the standing requirement. The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury *as the result of* [a statute's] enforcement." (emphasis in original) *Id.* at 618.

182. *See supra* text accompanying notes 158-60. *See also* Note, *Equity and the Ecosystem*, *supra* note 2, which states:

> One of the reasons for the existence of that rule [that the plaintiff must have a stake in the outcome of the controversy] is the desire of courts to ensure that the plaintiff in any particular case will be a representative advocate of the rights he is attempting to assert.

Id. at 1276. *See generally* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Scott, *supra* note 158, at 673, 677.

B. Comparing the Purpose of the Injury in Fact Test for Standing and the Interest Requirement for Intervention

A comparison of the interest requirement for intervention of right and the injury in fact test for standing demonstrates the similarity between the two doctrines. This similarity is particularly obvious when examining the purpose behind these concepts — both serve to test a proposed party's commitment to adjudication of a claim[183] and to measure whether that party will be an adequate representative of the interest it seeks to assert.[184] From this perspective, the tests for fulfillment of the two requirements should logically be similar.

Several courts have discussed the relationship between the interest test for intervention and the requirements which parties must meet for standing, but no guidelines have emerged from these cases.[185] Instead, the lower courts seem to take three different approaches to the relationship between standing and intervention. The first approach concludes that the test of a non-party's commitment for purposes of intervention should be less than the test necessary for standing.[186] This position is based on the fact that the need for standing results directly from the case or controversy requirement of the Constitution, while intervention raises no such constitutional question. Accordingly, since the real purpose of standing is to ensure a case or controversy between plaintiff and defendant, once this has been established

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183. Brunet, *supra* note 82, at 725-26. Brunet states:

> The standing requirement should extend to intervention petitions because a party without standing to sue would seemingly lack the incentive needed to propel the adversary dialogue to a proper result. The idea that an analysis of the intervenor's standing to sue will enable the court to determine whether intervention is appropriate under the adversary model's incentive notion is consistent with one of the policies the Supreme Court has identified with standing . . . in *Baker v. Carr* by referring to 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'
>
> It is apparent that the personal stake criteria of standing and the interest, impairment, and common question requirements of intervention overlap. The justifications behind these standards are concerned with some of the same problems: each standard should yield a real incentive to litigate.

Id. (quoting Baker v. Carr, 369 U.S. 186 (1962)).

184. Note, *Equity and the Ecosystem*, *supra* note 2, at 1276. *See supra* text accompanying note 182.

185. Diamond v. Charles, 106 S. Ct. 1697, 1707 (1976) ("However, the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the courts of appeals.").

186. *See, e.g.*, United States v. Imperial Irrigation Dist., 559 F.2d 509, 510 (9th Cir. 1977) (a party seeking to intervene does not need to have the standing necessary to initiate the lawsuit), *rev'd sub. nom. and vacated on other grounds*, Bryant v. Yellan, 447 U.S. 352 (1980); United States v. Bd. of School Comm'rs, 466 F.2d 573, 574 (7th Cir. 1972) (intervention requirements should generally be more liberal than standing requirements), *cert. denied*, Citizens of Indianapolis for Quality Schools, Inc. v. United States, 410 U.S. 909 (1973).

in the original suit there is no need to impose that requirement on an intervenor as well.[187]

A second approach to the relationship between standing and intervention concludes that satisfying the test for standing also satisfies the interest requirement for intervention. Although only one court has directly stated that satisfying standing requirements satisfies the interest requirement of Rule 24(a)(2),[188] several courts have taken the position that the two doctrines require the same type of interest, namely a "direct" interest in the ongoing litigation.[189] Furthermore, these courts sometimes state that the

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187. United States Postal Serv. v. Brennan, 579 F.2d 188 (2d Cir. 1978); Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) stating that "[i]n the context of intervention the question is not whether a lawsuit should be begun, but whether already initiated litigation should be extended to include additional parties."; New York State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc., 34 Fed. R. Serv. 2d 1377, 1378 (W.D.N.Y. 1982) (holding that if case or controversy is satisfied the proposed intervenor need not have standing to sue). *See also* Shapiro, *supra* note 36, at 726, stating:

> [I]t must be understood that there is a difference between the question whether one is a proper plaintiff or defendant in an initial action and the question whether one is entitled to intervene. Thus, to decide whether a particular action may be brought by this plaintiff against this defendant may require a determination of whether the controversy is ripe for adjudication, whether the parties before the court are the real parties in interest, and whether the interests asserted are sufficient to mobilize the judicial machinery. When one seeks to intervene in an ongoing lawsuit, these basic questions have presumably been resolved; the disposition of the request, then, should focus on whether the prospective intervenor has a sufficient stake in the outcome and enough to contribute to the resolution of the controversy to justify his inclusion.

Id.

188. Indian River Recovery Co. v. The China, 108 F.R.D. 383 (D. Del. 1985). In deciding a motion to intervene filed by a non-profit organization of dive boat operators, dive shops, and scuba diving clubs in a case involving the right to salvage the wreck of The China the court stated that "[a]n intervenor need not have standing necessary to have initiated the lawsuit. (Citations omitted). It follows that, if an applicant for intervention would have had standing to bring the action originally, it has satisfied the interest requirement of Rule 24(a)(2)." *Id.* at 386-87.

189. *See* Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985) (proposed intervenor's interest must be so direct that it could bring the suit itself), *cert. denied*, Illinois Pro-Life Coalition, Inc., III v. Keith, 106 S. Ct. 383 (1986); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984) (denying Senator Jesse Helms' motion to intervene in a procedure sealing F.B.I. information on Martin Luther King because Helms' interest in being better informed about King was not direct or protectable); National Wildlife Fed'n. v. Ruckelshaus, 99 F.R.D. 558 (D.N.J. 1983) (State of Delaware denied intervention in a suit challenging disposal of hazardous wastes in the Atlantic Ocean because, since no direct harm was being done to Delaware, its interest was not direct); Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316 (S.D. Fla. 1973) (denying intervention because organization's expressed environmental interests were not directly related to the action); United States v. I.T.T., 349 F. Supp. 22 (D. Conn. 1972) (denying Ralph Nader intervention in an antitrust suit against I.T.T. since, by representing the public interest in enforcing the antitrust laws, Nader did not have a direct interest sufficient for standing to bring the suit himself), *aff'd sub. nom.*, Nader v. United States, 410 U.S. 919 (1973).

proposed intervenor must have an interest separable from that of the general public,[190] a direct analogy to the generalized grievance limitation to standing.[191]

Considering the purpose behind the standing and intervention requirements — to ensure that a non-party is sufficiently connected with the outcome of litigation to adequately represent his interest[192] — both schools of thought presented thus far are rationally based. The first school of thought focuses primarily on the case or controversy requirement of standing and concludes that, since that requirement is satisfied by the initial parties, a proposed intervenor need only show a recognizable interest in the ongoing litigation. When a non-party can show such an interest, the non-party should be admitted to the litigation even if its interest does not rise to the level of an interest which would meet the case or controversy requirement of standing.[193] The second school of thought requires a more extensive interest on the part of the non-party, but, by requiring a "direct" interest, courts of this persuasion are still well within the purposes of the interest and standing requirements. Instead of requiring that two different tests be met, these courts simply require that the standing requirements be literally extended to questions of intervention.[194]

Despite the logic of these two positions, a third school of thought has also emerged that is not rationally based on the purposes of the interest and standing requirements. According to the courts which fall into this group, a proposed intervenor must show an interest greater than the interest required for standing. This point of view is perhaps best expressed by a recent Seventh Circuit decision, *United States v. 36.96 Acres of Land*.[195]

In *36.96 Acres of Land*, the court considered the question of intervention in a condemnation proceeding begun by the United States pursuant to a Congressional mandate.[196] Instead of completing the condemnation action, the government began settlement negotiations designed to keep at least some of the land in private hands. At this point an environmental group sought to intervene of right to protect the public use of the land as well as

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190. *See* Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (10th Cir. 1981) (proposed intervenor must have a unique interest in the controversy); Allard v. Frizzel, 536 F.2d 1332 (10th Cir. 1976) (denying the Audubon Society's motion to intervene because their interest in scientific and educational causes was no different than that of the general public).

191. *See supra* note 164.

192. *See supra* text accompanying notes 183-84.

193. *See supra* text accompanying notes 186-87.

194. *See supra* text accompanying notes 188-90.

195. 754 F.2d 855 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1956 (1986).

196. 754 F.2d at 857. The Congressional mandate was provided by an act to expand the Indiana Dunes National Lakeshore, Indiana Dunes National Lakeshore Act, 16 U.S.C. § 460u-12 (1982).

its environmental value.[197] In considering the group's motion to intervene, the court concluded that intervention of right requires a "direct, substantial, and legally protectable" interest[198] and that, although the group's interest in the environment might be "legitimate and demonstrable,"[199] it was not direct, substantial, or legally protectable, and therefore did not justify intervention of right.[200] In addressing the group's argument that, under *Sierra Club*, its environmental interest in the property was sufficient to allow intervention, the court concluded that an interest for standing purposes is qualitatively different from that necessary for intervention, and that the interest required for intervention is greater than that required for standing.[201] Accordingly, the court denied intervention, even though it acknowledged that the group could bring an action for mandamus against the Secretary of the Interior.[202]

The view espoused by the court in *36.96 Acres of Land* — that a nonparty may have an interest sufficient to allow it to file its own suit but still not be able to intervene in ongoing litigation — is contrary to the purpose of Rule 24's interest requirement.[203] The requirement that a proposed inter-

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197. 754 F.2d at 857.

198. *Id.* at 858.

199. *Id.* at 859.

200. *Id.* at 859. The court stated that:

> While the Council's aesthetic and environmental interest in Crescent Dune may indeed be legitimate and demonstrable, we cannot say that it is direct, substantial, or legally protectable. Therefore, the Council's interest in guaranteeing [the area's] natural beauty . . . for public use is not the type of interest which justifies intervention under Rule 24(a).

Id.

201. *Id.* at 859. The court stated that:

> The Council argues, however, that on the basis of *Sierra Club v. Morton*, the Council's intense concern for the National Lakeshore, (. . . and its members' personal aesthetic, conservational and recreational interest in the property . . .) is a sufficient interest to allow intervention under Rule 24(a)(2). . . . There is a qualitative difference between the 'interest' which is sufficient for standing to bring an action under the APA and the 'direct, significant legally protectable interest' required to intervene. . . . The 'interest' which will satisfy *Sierra Club* is simply one 'arguably within the zone of interest to be protected.' . . . The interest of a proposed intervenor, however, must be greater than the interest sufficient to satisfy the standing requirement.

Id. (citations omitted).

202. *Id.* at 860.

203. *See Id.* at 861 (Cudahy, J., dissenting). Cudahy stated that:

> The majority apparently concedes that the Council would have *standing* to maintain suit with respect to the preservation of the Dunes, but attempts to distinguish the interest required for that purpose from the interest of an intervenor in an action to condemn land for this national project. Not only is this distinction offered without any basis in authority, but it is highly formalistic. An interest in a national park surely involves an interest in acquisition of land for it and acquisition of that land may very well require condemnation. And traditional standing is sufficient interest to intervene. . . .

Id.

venor have an interest in the litigation which will be impaired by the outcome of that litigation serves to test the non-party's commitment to representing its asserted interest. The injury in fact test of standing serves the same purpose.[204] Considering the constitutional implications of the case or controversy element of standing, and the fact that the original plaintiff and defendant have already satisfied that criteria, an argument that favors either a lesser test for intervention,[205] or equivalence between the two tests,[206] can be rationally supported. A test that holds a proposed intervenor to a higher standard than one who seeks to bring suit initially has no such rational basis. Indeed, such a test is contrary not only to the purpose of the interest requirement but to the expanding nature of civil litigation and the liberalized rule which resulted from the 1966 amendment.[207]

The similarity of purpose behind the interest requirement for intervention under Rule 24 and the injury in fact test for standing clearly shows the compatibility of the doctrines. Nonetheless, the emergence of three different schools of thought on the relationship between standing and intervention shows that guidelines are necessary. Applying well-developed standing principles to intervention suggests the following guidelines.

V. PROPOSED GUIDELINES

In keeping with the similarities between the intervention and standing tests,[208] these guidelines require that a prospective intervenor meet the constitutional standard required to bring the suit initially.[209] Furthermore, in keeping with standing's prudential rule against representing the interests of third parties,[210] under these guidelines proposed intervenors must assert an injury to themselves. This standard, by requiring both a cognizable interest and a direct injury to the proposed intervenor, is in keeping with the purposes of both the interest requirement for intervention and the injury in fact test for standing. By insisting that the third party assert a direct stake in the outcome, this standard assures the third party's commitment to the litigation, and, therefore, the party's incentive to pursue that litigation.

One departure from traditional standing theory is necessary. In recognition of the fact that those seeking to intervene in ongoing litigation often represent the "public interest," the prudential generalized grievance rule

204. *See supra* text accompanying notes 183-84.
205. *See supra* text accompanying notes 186-87.
206. *See supra* text accompanying notes 188-90.
207. *See supra* text accompanying notes 71-75.
208. *See supra* text accompanying notes 183-84.
209. *See supra* text accompanying notes 157-82.
210. *See supra* note 165.

should not apply to intervention decisions.[211] Accordingly, under these guidelines, a proposed intervenor who purports to represent an interest shared by many should not be denied intervention simply because its interest is too generalized.[212] Even if the third party's individual interest appears insignificant, the court should allow intervention if it concludes that the asserted interest is cognizable, sufficiently connected to the litigation, and not already represented, provided the proposed intervenor can show that it will suffer some impairment of that interest.

Based on this premise, courts considering the sufficiency of a non-party's interest in ongoing litigation should begin their inquiry by assessing the nature and extent of the proposed intervenor's interest under traditional standing criteria. First, the courts should consider whether the interest which the non-party seeks to represent is one recognized as appropriate for judicial review. Following the Supreme Court's decisions in *Data Processing*[213] and *Sierra Club*,[214] the interest no longer must be economic — almost any cognizable interest will do.[215] Next, courts should consider the manner in which that asserted interest will be impaired by the outcome of the ongoing litigation if the court does not permit the non-party to intervene.[216] If not allowing intervention will result in direct injury to the third party, and becoming a party to the litigation will protect the third party's interest, the court should permit the third party to intervene, subject only to considerations of whether adequate representation already exists.[217]

Adoption of these guidelines by courts deciding intervention questions would have far-reaching effects for environmental groups. First, these guidelines provide a standard against which courts can measure intervention petitions. Although courts will still reach different results given different factual settings, if these guidelines are adopted environmental groups nationwide will know that their petitions are being measured against the same criteria.

Second, courts implementing these guidelines will be adopting standing criteria with respect to the type of interest recognizable for purposes of intervention. The Supreme Court held in *Sierra Club* that environmental and aesthetic interests are recognizable for purposes of standing.[218] Using these guidelines, those interests are also recognizable for purposes of intervention.

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211. *See supra* note 164.

212. The *Sierra Club* Court reached the same conclusion with regard to standing when environmental interests were at stake. *See supra* note 179 and accompanying text.

213. 397 U.S. 150 (1970).

214. 405 U.S. 727 (1972).

215. *See supra* text accompanying notes 173-79.

216. *See supra* text accompanying notes 124-25.

217. *See supra* text accompanying notes 96-98.

218. *See supra* text accompanying notes 177-79.

Courts considering intervention by environmental groups should no longer dismiss the environmental interest by saying that it does not rise to the level of interest required for intervention of right.[219]

Third, these guidelines allow for representation of a general interest as long as the proposed intervenor itself shares in that interest. Accordingly, use of these guidelines will mean that environmental groups will no longer come up against courts that declare the group's interest to be too generalized.[220] Under these guidelines, a proposed intervenor representing environmental interests with which it can show a direct connection should be allowed to intervene even if it shares those interests with society as a whole.

VI. CONCLUSION

Imagine again the courtroom scene which began this note. In addition to the judge and two opposing parties included in your original mental picture, several third parties, including the citizen group concerned about the environmental value of the disputed property, should now be present. If the court in this imaginary scene follows the guidelines proposed by this note it will allow this environmental group to intervene of right in the ongoing litigation, provided that the group can show some way in which it will be injured by the outcome of the suit.

The guidelines proposed by this note cannot eliminate the need to consider the nature of a proposed intervenor's interest on a case-by-case basis. They can, however, provide a place for courts to start when assessing that interest. Based on a perceived similarity of purpose between the constitutional doctrine of standing and the interest requirement for intervention, the guidelines proposed here assess the interests of proposed intervenors against previously developed guidelines for standing. Applying these guidelines, when a third party meets the standing test to bring suit it has met the interest test for purposes of intervention under Rule 24(a)(2). Furthermore, using these guidelines, the prudential generalized grievance rule will not be applicable and representation of the public interest will be acceptable for purposes of intervention.

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219. *See, e.g.*, United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1956 (1986); *supra* notes 201-02 and accompanying text.

220. *See* cases cited *supra* note 189. *See also* Note, *Equity and the Ecosystem*, *supra* note 2, which states that:

> It is arguable that the standing doctrine should not prevent a conservation group from obtaining equitable relief. It cannot be denied that most conservation groups have a fervent and an earnest interest in the values which they represent, and so actual or threatened injury to those values seems to give such groups a significant stake in the outcome of [a suit].

Id. at 1275.

This note has shown the inconsistency of decisions with respect to intervention by environmental organizations. Applying the guidelines proposed should eliminate that inconsistency. By promoting both consistency among courts and recognition of environmental interests, adoption of these guidelines will make it easier for environmental groups to intervene. Such intervention will benefit not only those groups, but all of us who share the finite resources of this planet.

JEAN L. DOYLE