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The Relationship Between Standing and Intervention: The Tenth Circuit Answers by "Standing" Down. San Juan County v. United States

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THE RELATIONSHIP BETWEEN STANDING AND INTERVENTION: THE TENTH CIRCUIT ANSWERS BY "STANDING" DOWN

San Juan County v. United States[1]

I. INTRODUCTION

Under both the standing doctrine and Rule 24(a)(2) of the Federal Rules of Civil Procedure ("FRCP"), a litigant must possess an interest in the subject matter of the action.[2] The relationship between these dual "interest" requirements has received minimal consideration by the Supreme Court,[3] and the lack of guidance on the matter has led to contrasting approaches among the circuit courts on what is necessary to meet the mandates of each.[4] In *San Juan County v. United States*, the Tenth Circuit addressed the issue for the first time,[5] and ultimately held that a party seeking to intervene need not establish its own standing to sue or defend in addition to meeting the requirements of FRCP 24(a)(2).[6] Besides providing the Tenth Circuit with precedent on the matter, a notable contribution of the case may be to demonstrate that the standing-intervention question likely has limited value in determining whether a circuit will allow a party to intervene.

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[1] 420 F.3d 1197 (10th Cir. 2005).

[2] *Id.* at 1203.

[3] *Id.* at 1204.

[4] *Id.* The Seventh, Eighth and D.C. Circuits have held that an "intervenor must establish its own standing in addition to meeting FRCP 24(a)'s interest requirement prior to intervening." *Id.* The Second, Fifth, Sixth, Ninth and Eleventh Circuits have come to the opposite conclusion, and they have all held "that a party trying to intervene need only meet the Rule 24(a) interest requirement." *Id.*

[5] *Id.* at 1203.

[6] *Id.* at 1206. This holding is narrowed in practice due to the Supreme Court's decision in *Diamond v. Charles*. In *Diamond*, the Court did not explicitly address the issue in *San Juan County*, but it did hold that in order for an intervening party to appeal, there must be a party on its side of the action with standing. *Id.* at 1205-06.

II. FACTS AND HOLDING

San Juan County ("San Juan") brought a quiet title action against the United States, the Department of the Interior, and the National Park Service (collectively "federal defendants").[7] San Juan claimed a highway right-of-way pursuant to Section 8 of the Mining Act of 1866, codified at 43 U.S.C. § 932.[8] The alleged right-of-way lies largely in the bed of Salt Creek,[9] located within Canyonlands National Park.[10] Three wildlife conservation groups (collectively "SUWA") sought intervention on behalf of the federal defendants,[11] both permissively and as a matter of right,

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[7] *Id.* at 1203. The action was brought in accordance with the Quiet Title Act, 28 U.S.C. § 2409a (2000).

[8] *San Juan County*, 420 F.3d at 1201. The Section "was enacted by Congress . . . to assist in the development of the West by granting rights of way for construction of highways over public lands to miners, farmers, ranchers, and homesteaders." *Id.* The "right-of-way could be obtained without application to or approval by the federal government." *Id.* Congress repealed Section 932 in 1976 with one caveat, it protected the rights-of-way in existence at the time of repeal. *Id.* at 1202. San Juan asserts that its right-of-way, known as the Salt Creek Road, was used for decades prior to the federal government's reservation of the lands to create Canyonlands National Park. *Id.*

[9] Opening Brief for Appellant SUWA at 2, *San Juan County v. United States*, 420 F.3d 1197 (10th Cir. 2005) (No. 04-4260). "[The] Salt Creek Canyon is an unusually important feature of Canyonlands National Park . . . [b]ecause of its beauty and uncommonly lush environment . . . ." *Id.* at 5. The Salt Creek supports an extensive riparian area in Canyonlands National Park. *Id.* at 6. As surface water and riparian habitats are rare in the arid Canyonlands National Park, it is particularly important to those species requiring such habitat. *Id.* at 6-7. Salt Creek and the Canyon also contain "the highest recorded density of archeological sites in the National Park. *Id.* at 8. The right-of-way claimed by San Juan is for all practical purposes the Salt Creek itself. *Id.* Due to the narrowness and ruggedness of the Canyon, a rerouting of the road is impossible. *Id.*

[10] *Id.* at 1202. Canyonlands National Park was created by Congress in 1964 and "comprises one of the largest expanses of rough, scenic, redrock country in the southwestern United States." Opening Brief for Appellant SUWA at 6, *San Juan County* (No. 04-4260). A peripheral issue was San Juan's seeking of a declaratory judgment that the National Park Service ("NPS") cannot use a gate to impede its alleged right-of-way.

[11] The conservation groups were the Southern Utah Wilderness Alliance, the Wilderness Society, and the Grand Canyon Trust. *Id.* The Southern Utah Wilderness Alliance is an environmental group which aims to build strong and lasting support for wilderness preservation. Southern Utah Wilderness Alliance Homepage, http://www.suwa.org. A large portion of its recent work has involved attempts to stop the State of Utah from

under Federal Rule of Civil Procedure ("FRCP") 24.[12] The sole purpose for the intervention by SUWA was to oppose recognition of the right-of-

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attaining motor vehicle right-of-ways under the Mining Act of 1866. *Id.*; *see also San Juan County*, 420 F.3d at 1201; and *infra* note 13 with accompanying text. The Wilderness Society is an environmental group created in 1935 by Aldo Leopold, a wildlife ecologist at the University of Wisconsin. The Wilderness Society Homepage, http://www.wilderness.org. The group's mission is the following: "Deliver to future generations an unspoiled legacy of wild places, with all the precious values they hold: Biological diversity; clean air and water; towering forests, rushing rivers, and sage-sweet, silent deserts." *Id.* The groups crowning achievement is the instrumental role it played in the passage of the 1964 Wilderness Act. *Id.* The Grand Canyon Trust classifies itself as a regional [the greater Grand Canyon region of northern Arizona and in the red rock country of southern Utah] conservation organization that advocates "common sense solutions to the significant problems affecting the region's natural resources." The Grand Canyon Trust Homepage, http://www.grandcanyontrust.org. Its current work is focused in eight categories: air quality and energy; forests; landscape protection; restoration; water; volunteer; spatial analysis and Native America. *Id.*

[12] *Id.* These parties have been involved with ongoing litigation concerning Salt Creek Canyon since 1992. Opening Brief for Appellant SUWA at 8-9, *San Juan County* (No. 04-4260). In the 1990s, the NPS prepared a management plan for Canyonlands National Park to address increased visitor impact on the Park. During the "plan" process, and in accordance with administrative procedural requirements, SUWA submitted comments to the NPS urging it to close Salt Creek Road to all motorized traffic. When the NPS instead chose to implement a permit system that would minimize, but not eliminate, motorized traffic on Salt Creek Road, SUWA sued the NPS. The federal district court held that the NPS could not permit motorized vehicles in Salt Creek Canyon past a specific point, but the Tenth Circuit reversed this determination, holding that the district court used an improper legal standard in reaching its conclusion and remanded the case to the district court. After the district court's initial decision, there was no motorized traffic in the canyon for several years. As a result, trees and other forms of vegetation were able to return to the vehicle tracks. In response to this ecological rebirth, the NPS prepared an environmental assessment to determine the efficacy of allowing motorized traffic in Salt Creek Canyon. In a shift of opinion, the NPS sided with SUWA and closed Salt Creek Canyon above Peekaboo campsite to all motorized traffic, erecting a gate to accomplish the closure. In the intervening time, the federal district court, now determining the action remanded by the Tenth Circuit, permitted SUWA to amend its complaint against the NPS to include San Juan County and the State of Utah as defendants. When San Juan County and the state of Utah filed a motion for partial summary judgment based upon a 43 U.S.C. § 932 right-of-way argument, the district court held that it did not have jurisdiction to grant the partial summary judgment those parties sought, because they had never adequately pled a claim under the federal Quiet Title Act, and dismissed them from the case. The current action ensued. *San Juan County*, 420 F.3d at 1201-03.

way in Salt Creek Canyon.[13] Prior to the instant decision, SUWA participated in extensive litigation concerning the scope of motorized traffic allowed on the right-of-way.[14] San Juan and the federal defendants each opposed the intervention,[15] claiming that without an ownership interest in Salt Creek, SUWA did not satisfy the language of FRCP 24,[16] specifically the requirement under FRCP 24(a)(2) that the party attempting to intervene "have an interest relating to property that is the subject matter of the action."[17] Believing the past protectionist involvement with Salt Creek Canyon was not controlling,[18] the district court denied the request to intervene,[19] and as a decision denying intervention is immediately appealable,[20] SUWA appealed.[21]

On appeal, San Juan argued that SUWA must first establish standing before intervening under FRCP 24.[22] After recognizing that the standing/intervention argument "raise[d] a question of first impression in this circuit,"[23] the Tenth Circuit reversed the district court's decision.[24] The court held that a party seeking to intervene under FRCP 24, as either a matter of right or permissively,[25] is not required to establish its own Article III standing in addition to meeting the requirements of FRCP 24.[26]

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[13] Opening Brief for Appellant SUWA at 3, *San Juan County* (No. 04-4260).
[14] *San Juan County*, 420 F.3d at 1202. For an extensive description of the earlier litigation see *supra* note 13.
[15] *Id.*
[16] Opening Brief for Appellant SUWA at 3, *San Juan County* (No. 04-4260).
[17] *Id.*
[18] *San Juan County*, 420 F.3d at 1202.
[19] *Id.*
[20] *Id.* An order denying intervention is final and subject to immediate review if it prevents the applicant from becoming a party to an action. *See* Utah Ass'n of Counties v. Clinton, 225 F.3d 1246, 1249 (10th Cir. 2001).
[21] *San Juan County*, 420 F.3d at 1202.
[22] *Id.* at 1203.
[23] *Id.*
[24] *Id.* at 1206.
[25] *Id.*
[26] *Id.* This is the case "so long as another party with constitutional standing on the same side as the intervenor remains in the case." *Id.*

III. LEGAL BACKGROUND

A. The Standing Doctrine

Under Article III of the United States Constitution, federal judicial power is limited to deciding "cases" and "controversies."[27] The standing doctrine "is an aspect of the case-or-controversy requirement,"[28] the basis of which is to prevent the issuance of advisory opinions.[29] To qualify as a party with standing to litigate, a party must demonstrate an invasion of a *legally protected interest* that is concrete, particularized, and actual or imminent.[30] Standing is often referred to as a confused area of the law by courts and commentators,[31] and the criteria for standing is by no means static.[32] Furthermore, because standing directly implicates a federal court's subject matter jurisdiction,[33] it must be established prior to addressing the merits of a case.[34]

There are a number of policy reasons for the creation and continued existence of the standing doctrine.[35] First, the doctrine promotes separation of powers by preventing courts from exercising a pervasive form of judicial review.[36] For example, through standing restrictions on

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[27] Diamond v. Charles, 476 U.S. 54, 61 (1986).

[28] Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997).

[29] ERWIN CHERMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 53-54 (2d ed. 2002). The justifications for prohibiting advisory opinions include: maintaining separation of powers by only resolving actual disputes between parties, the conservation of judicial resources that could be unwisely expended "advising" on legislation that would ultimately not garner approval, and to "ensure that cases will be presented to the Court in terms of specific disputes, not hypothetical legal questions." *Id.*

[30] *Arizonans for Official English*, 520 U.S. at 64.

[31] *See generally* JOSEPH VINING, LEGAL IDENTITY 1 (1978); *see also* Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982) ("[T]he concept of Art. III standing has not been defined with complete consistency . . . .").

[32] *Valley Forge Christian Coll.*, 454 U.S. at 475.

[33] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180 (2000).

[34] *Id.*

[35] CHERMINSKY, *supra* note 30, at 61-62.

[36] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983); Raines v. Byrd, 521 U.S. 811,

who may sue in federal courts, the doctrine limits judicial review of the actions of the other branches of government rather than allow federal courts unfettered discretion concerning what cases they will decide.[37] Secondly, standing may facilitate judicial efficiency by preventing those who do not meet the requirements from filing lawsuits based in large part on ideological grounds.[38] If the federal courts were burdened by ideological suits, their resources would not be properly focused on cases where the legal issues are clear and the dispute is ripe for resolution.[39]

Third, and directly related to the negative effects that could arise if ideological litigation was permitted,[40] standing ensures "that there is a specific controversy before the court [so] an advocate with a sufficient personal concern [will] litigate the matter."[41] The rationale is that when a party has a particularized personal interest in the outcome of a case, it will do all that is possible to be victorious.[42] This will, in theory, lead to a more coherent and well-reasoned presentation of the legal issues.[43] Finally, if the standing doctrine did not exist, the Supreme Court has recognized the possibility that litigious intermeddlers could assert the rights of others to provide protection that the latter do not desire.[44] Therefore, standing mandates that individuals assert their own rights by bringing a personalized claim,[45] "[a]n interest shared generally with the public at large . . . will not do."[46]

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819 (1997); Allen v. Wright, 468 U.S. 737, 752 (1984); and Warth v. Seldin, 422 U.S. 490, 498 (1975).

[37] *See supra* notes 32 and 37.

[38] CHERMINSKY, *supra* note 30, at 61.

[39] *Id.* at 61 nn.10-11 (citing United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring); and United Pub. Workers v. Mitchell, 330 U.S. 75, 90-91 (1947)).

[40] *See supra* note 37.

[41] CHERMINSKY, *supra* note 30, at 61.

[42] *Id.* (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

[43] *See generally Baker*, 369 U.S. at 204.

[44] Singleton v. Wulff, 428 U.S. 106, 113-114 (1976).

[45] CHERMINSKY, *supra* note 30, at 62.

[46] Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997).

B. Intervention: History and policy

As a general matter, individuals not parties to a suit are unable to participate in or control the proceedings of the suit.[47] Through the procedural device of intervention,[48] a party may be granted party status to an existing suit and will have the ability to participate fully.[49] Intervention recognizes that parties who were not original parties to the litigation may nonetheless "have an interest in entering . . . if the outcome will have an effect on them."[50] There are a number of competing "interests"

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[47] Brian Hutchings, *Waiting for Divine Intervention: The Fifth Circuit Tries to Give Meaning to Intervention Rules in* Sierra Club v. City of San Antonio, 43 VILL. L. REV. 693, 699 (1998).

[48] Intervention has its roots in equity and admiralty practice. Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L. Q. 215, 240 (2000). In addition, intervention has been characterized by commentators as "a relatively recent development in the law." Hutchings, *supra* note 48, at 702, 702 n.31 ("Intervention ... is a comparatively recent innovation in Anglo-American legal procedure. It was a familiar device in the Roman law and thus in the civil law generally and there had been rudimentary procedures of this kind available in admiralty, and occasionally at common law and equity, but these were not well developed nor of very general applicability") (citing 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1901 (2d ed. 1986)); *see also* James W. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 568-74 (1936)).

[49] Hutchings, *supra* note 48, at 699.

[50] *Id.* at 700. A thoughtful law review article provides excellent commentary on a situation where intervention may be used:

> In the standard private lawsuit, A v. B, the procedural device of intervention falls within the larger context of multiparty practice, that is, how and under what circumstances outsiders are added to the original litigation. Thus, if A sues B to require B to repay a debt to A, and C claims an interest in the transaction – for example, C claims that B owes C money as well, and paying A will interfere with C collecting from B – various devices can be used to involve C in the litigation . . . . If C believes that the two original parties have colluded or will otherwise dispose of C's interest without C's involvement – for example, if A sues B for repayment on the debt, and B is in collusion with A and knows that A will not enforce the judgment – then C may get involved through the device of intervention to protect C's interest . . . .

Appel, *supra* note 49, at 239-40.

intervention attempts to balance and provide with representation.[51] These include the original parties' interest in controlling the litigation,[52] the court's interest in reaching the best possible decision, which may be facilitated by an intervenor's expertise,[53] and the court's interest in efficiently resolving disputes.[54]

Since its codification in 1937,[55] FRCP 24 has consisted of two types of intervention, intervention of right and permissive intervention.[56] Intervention of right is granted once the party attempting to intervene meets the requirements set forth in FRCP 24(a),[57] when a statute grants an

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[51] Hutchings, *supra* note 49, at 699-701.
[52] *Id.* at 700.
[53] *Id.*
[54] *Id.* at 700-01.
[55] *Id.* at 703.
[56] *Id.* The 1937 version of Rule 24 read, as to intervention of right:

> (a) 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 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 property in the custody of the court or an officer thereof.

FED. R. CIV. P. 24 (1937).
[57] FED. R. CIV. P. 24(a) (2005) (granting right to intervene). The current version of Rule 24 states (in relevant part):

> (a) 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.
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> (b) 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

unconditional right to intervene or an applicant has an interest in the litigation that is not adequately represented by the parties and it could be impaired by the outcome of the action.[58] When these requirements are met, a court must grant the intervention.[59]

With permissive intervention,[60] intervention is granted at the court's discretion and "*can be* allowed when there is a *common question of law or fact* between the litigation and the applicant's claim or defense."[61] Thus, a party seeking to intervene can eliminate the court's discretionary power under FRCP 24(b)[62] by placing itself within the plain language of FRCP 24(a).[63] It is for this reason that the majority of case law and commentary on Rule 24 has focused on intervention of right.[64]

> 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.

Id. at 24(a)-(b). The Tenth Circuit only addressed the issue of permissive intervention in passing, so this Note will only do so as well. San Juan County v. U.S., 420 F.3d 1197, 1206 (10th Cir. 2005). Specifically, the court's extent of coverage was its statement that "[f]or the same reasons relied upon above [its logic regarding intervention as of right], we also conclude that a party seeking to intervene permissively need not first establish its standing." *Id.*

[58] Hutchings, *supra* note 48, at 703-704 (citing FED. R. CIV. P. 24(a) (2005)).

[59] FED. R. CIV. P. 24(a). For the relevant text of FED. R. CIV. P. 24, see *supra* note 58.

[60] FED. R. CIV. P. 24(b). While the court in *San Juan County* did not find the need to analyze the claim of SUWA under permissive intervention, a brief overview of it is provided in order to place intervention of right in the context of an aggregate FED. R. CIV. P. 24.

[61] Hutchings, *supra* note 48, at 703-704 (citing FED. R. CIV. P. 24(b)) (emphasis added).

[62] FED. R. CIV. P. 24(b).

[63] FED. R. CIV. P. 24(a).

[64] *See generally* Appel, *supra* note 49; Ellyn J. Bullock, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated Into Intervention of Right*, 1990 U. ILL. L. REV. 605 (1990); Rodrick J. Coffey, *Giving a Hoot About an Owl Does Not Satisfy the Interest Requirement for Intervention: The Misapplication of Intervention as of Right in* Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior, 1998 B.Y.U. L. REV. 811 (1998); Hutchings, *supra* note 48; Juliet Johnson Karastelev, *On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join A Lawsuit*, 52 DUKE L.J. 455 (2002); Tyler R. Stradling & Doyle S. Byers, *Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 B.Y.U. L.

C. Intervention: Interpretation and changes to the rule

Due to the Supreme Court's restrictive interpretation of FRCP 24 in *Sam Fox Publishing Co. v. United States*,[65] the Rule was amended in 1966 to increase the availability of intervention to those wishing to participate in pending litigation.[66] In *Sam Fox Publishing*,[67] the Court, citing the language of FRCP 24,[68] held that applicants for intervention of right must show that they will be legally bound by a judgment before intervening under Rule 24(a)(2).[69] Specifically, the applicant must satisfy the requirement that the party "is or may be bound by a judgment in the action"[70] in addition to showing that their interests may be inadequately represented or that they would be adversely affected by a disposition of property in the custody of the court.[71] When the "bound" language was read literally in terms of res judicata,[72] it appeared to eliminate the possibility of parties intervening as of right.[73] For example, if an applicant sought to intervene based on inadequacy of representation, they were no longer "bound" by the judgment for purposes of res judicata, but if the

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REV. 419 (2003); and San Juan County, 420 F.3d 1197 (10th Cir. 2005). *But see* Amy M. Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 681 (2002).

[65] Appel, *supra* note 49, at 240 (citing Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961)).

[66] Hutchings, *supra* note 48, at 707-709. Prior to the 1966 amendments, Rule 24 was also amended in 1946, 1948, and 1963, but these amendments lacked the long-term significance of those in 1966. FED. R. CIV. P. 24, advisory committee notes.

[67] 366 U.S. 683 (1961).

[68] *Id.* at 694.

[69] *Id.* (holding that showing by applicant that it will be legally bound by court's decision "is what must be made out before a party may intervene as of right").

[70] FED. R. CIV. P. 24, 1966 advisory committee note.

[71] *See* FED. R. CIV. P. 24(a) (1937).

[72] Res judicata is defined as: 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit of the same claim. The three essential elements are (1) an earlier decision on the identical issue, (2) a final judgment on the merits, and (3) the involvement of the same parties or parties in privity with the original parties. A HANDBOOK OF BASIC LAW TERMS 189-90 (Bryan A. Garner ed., West Group 1999).

[73] *See* FED. R. CIV. P. 24, 1966 advisory committee note; and Hutchings, *supra* note 48, at 706.

representation was adequate, the applicant no longer met the requirements of FRCP 24(a)(2).[74]

The 1966 amendment replaced the "bound" language with the current four-prong test.[75] Currently, applicants can intervene if: (1) the application was timely; (2) the applicant "claims an interest relating to the property or transaction which is the subject of the action;" (3) the disposition of the action may impair or impede the ability to protect that interest; and (4) the applicant is not adequately represented by existing parties.[76] The second prong of the test has received a great deal of judicial attention, and what constitutes a sufficient "interest" is often the central issue in cases concerning FRCP 24.[77]

D. A lack of clarity defining "interest"

Although courts have repeatedly dealt with the "interest" issue,[78] there is no agreement on what type of interest is required to satisfy the requirements of FRCP 24.[79] However, a number of Supreme Court cases provide limited guidance on the matter.

In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,[80] the Supreme Court applied the amended Rule 24 to an antitrust case appealed directly to the Court under the Expediting Act.[81] The case involved a merger of two natural gas companies the Court found to be in violation of the Clayton Act.[82] After the Court remanded the case to the district court for divestiture,[83] three parties sought to intervene.[84] The district court

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[74] FED. R. CIV. P. 24, 1966 advisory committee note.
[75] Hutchings, *supra* note 48, at 707.
[76] FED. R. CIV. P. 24(a).
[77] Hutchings, *supra* note 48, at 708-710. This is in large part due to the lack of Supreme Court precedent on the issue. *See supra* notes 4 and 7 and accompanying text.
[78] *See supra* notes 4 and 7 and accompanying text.
[79] *See supra* notes 4 and 7 and accompanying text.
[80] 386 U.S. 129 (1967).
[81] *Id.* at 131-34.
[82] *Id. See also* United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) (this was the case name the first time the parties reached the Supreme Court).
[83] *El Paso Natural Gas Co.*, 376 U.S. at 662. The Court held that the acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company violated § 7 of the Clayton Act and directed the district court "to order divestiture without delay." *Id.*

denied intervention to the parties,[85] but the Supreme Court permitted intervention under a broad interpretation of "interest" and "transaction which is the subject of the action."[86]

The broad interpretation enunciated in *Cascade* was narrowed in *Donaldson v. United States*.[87] In *Donaldson*, an individual being investigated by the IRS attempted to intervene in the IRS's action to compel his former employer to provide the agency with his employment records.[88] Donaldson believed that government agents were improperly using a section of the Internal Revenue Code[89] "for the express and sole purpose of obtaining [criminal] evidence."[90] As the objective of this statutory scheme was to ascertain the correctness of a return,[91] using it as a pretext to gather criminal evidence was alleged to be impermissible.[92] The Supreme Court found that Donaldson did not have a sufficient interest in the subject of the litigation,[93] and held that a "significantly protectable

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The primary rationale of the divestiture was to restore the competitive market that was undermined by the illegal acquisition. *Cascade*, 386 U.S. at 135 ("For it was the absorption of Pacific Northwest by El Paso that stifled that competition and disadvantaged the California interests").

[84] *Cascade*, 386 U.S. at 132-33. The three parties were: the State of California, Southern California Edison, and Cascade Natural Gas. *Id.* California was where El Paso sold most of its gas and its purpose for intervening was to see Pacific Northwest restored as an effective competitor in California. *Id.* at 132. Southern California Edison was a large industrial user of natural gas that purchased from El Paso components and it also desired retaining the competitive atmosphere in California. *Id.* at 132-33. Cascade Natural Gas was a distributor in Oregon and Washington whose sole supplier of natural gas was Pacific Northwest. *Id.* at 133.

[85] *Id.* at 136 ("We therefore reverse the District Court in each of these appeals and remand with directions to allow each appellant to intervene as of right . . . .").

[86] *Id.* at 135. The Court chose to apply the new version of FED. R. CIV. P. 24 because the "Rule applies to 'further proceedings' in pending actions." *Id.* at 135-36. This choice was an issue of contention between the majority and dissent. *Id.* at 153.

[87] 400 U.S. 517 (1971).

[88] *Id.* at 518-521.

[89] 26 U.S.C. § 7602 (1954).

[90] *Donaldson*, 400 U.S. at 521.

[91] *Id.* at 519.

[92] *Id.* at 521.

[93] The court noted that what was sought here by the IRS was the production of an employer's records and not the records of the taxpayer. *Id.* at 522-23. The summonses issued were directed to a third person with no established legal privilege (i.e. attorney and

interest" was necessary to meet the interest requirement under FRCP 24(a)(2).[94]

Further discussion on FRCP 24 was provided in *Trbovich v. United Mine Workers of America*.[95] The decision, based on Title IV of the Labor-Management Reporting and Disclosure Act,[96] did not specifically involve the "interest" criteria, but it "seemed to imply that an applicant does not need to show standing to sue" in order to intervene.[97] That said, *Trbovich* "has been cited by courts both finding and denying standing for intervenors."[98] The most significant impact *Trbovich* has had so far is through its statement in a footnote that the burden of showing inadequacy of representation "should be treated as minimal."[99]

The standing-intervention question was discussed by the Court in *Diamond v. Charles*,[100] but it refused to resolve the issue.[101] In *Diamond*, a group of physicians filed a class action suit challenging the constitutionality of an Illinois abortion law.[102] Diamond, a pediatrician, filed a motion to intervene as a defendant, asserting that his interest was his objection to abortions as well as his status as both a pediatrician and a parent of a minor daughter.[103] After the district court ordered a preliminary

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client), and "had to do with records in which the taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer." *Id.* at 523.

[94] *Id.* at 531. Only minimal elaboration on "significantly protectable interest" was provided ("Donaldson's only interest – and of course it looms large in his eyes – lies in the fact that those records presumably contain details of Acme-to-Donaldson payments possessing significance for federal income tax purposes. This asserted interest, however, is nothing more than a desire by Donaldson to counter and overcome [the third parties' willingness to produce the records]"). *Id.* at 530-31.

[95] 404 U.S. 528 (1972).

[96] 29 U.S.C. §§ 401-531 (2000).

[97] Hutchings, *supra* note 48, at 712.

[98] Gardner, *supra* note 65, at 692.

[99] Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal").

[100] Diamond v. Charles, 476 U.S. 54 (1986).

[101] *Id.* at 68-69.

[102] *Id.* at 57-58.

[103] *Id.*

injunction against enforcement of the law, only Diamond appealed.[104] As a result, the issue for the Court to address was narrowed to what interest is necessary to appeal.[105] The Court held that if an intervenor wishes to appeal a judgment alone, the party must show that it "fulfills the requirements of Art. III."[106] Consequently, the standing-intervention issue remains relatively unanswered, allowing the circuit split to persist.

E. The Circuit Split

The Seventh, Eighth, and D.C. Circuits have held that an intervenor must meet the requirements of both FRCP 24(a)(2) and standing in order to intervene of right.[107]

In an action brought by the Army Corps of Engineers to prevent the construction of a landfill,[108] the Seventh Circuit discussed "the minimal standing required by Article III, which [the] court requires of any intervenor."[109] It considered the possibility that the "interest" requirement in FRCP 24(a)(2) could be less than that of standing,[110] but concluded that standing is required.[111] Resolving the case on a different component of FRCP 24(a)(2),[112] the court found that the interests of the original party and those of the potential intervenors were identical.[113] Therefore, intervention of right was denied.[114] Subsequently, the Seventh Circuit vacated the denial of permissive intervention and remanded the case to the district court for reconsideration of the issue.[115]

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[104] *Id.*
[105] *Id.* at 68.
[106] *Id.*
[107] San Juan County v. U.S., 420 F.3d 1197, 1204 (10th Cir. 2005).
[108] Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503, 507 (7th Cir. 1996).
[109] *Id.* (citing United States v. 36.96 Acres, 754 F.2d 855, 859 (7th Cir. 1985)).
[110] *Id.* at 506.
[111] *Id.*
[112] *Id.* at 508.
[113] *Id.*
[114] *Id.* at 508-09.
[115] *Id.* at 509.

In *South Dakota v. Ubbelohde*,[116] the Eighth Circuit addressed the standing-interest question in a case arising out of the apportionment of water from the Missouri River.[117] The court, without providing a policy rationale or citing to other case law,[118] explicitly held that "[a] party seeking to intervene must establish both that it has standing to complain and that the elements of Rule 24(a)(2) are met."[119] This holding did not prevent the court from permitting petitioners to intervene, finding that each of the intervenors satisfied its enunciated standard.[120]

The D.C. Circuit has held that "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he [sic] must satisfy the standing requirements imposed on those parties."[121] *Fund for Animals, Inc. v. Norton* dealt with the application of the Endangered Species Act ("ESA")[122] to argali sheep located within Mongolia's borders.[123] Fund for Animals, along with various other wildlife conservation groups, filed suit against the Secretary of the Interior and the Director of the Fish and Wildlife Service due to their failure to classify the argali sheep as endangered,[124] as opposed to threatened.[125] The D.C. Circuit ultimately found that the country of Mongolia, through its Natural Resources Department, was entitled to intervention of right.[126] The court first analyzed the standing component[127] and noted that once a

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[116] 330 F.3d 1014 (8th Cir. 2003).
[117] *Id.* at 1019-22.
[118] *Id.* at 1023-24.
[119] *Id.* at 1023.
[120] *Id.* at 1023-26.
[121] Fund for Animals, Inc. v. Norton, 322 F.3d 728, 732 (D.C. Cir. 2003) (citing City of Cleveland v. NRC, 17 F.3d 1515, 1517 (D.C. Cir. 1994)); *see generally* Military Toxics Project v. EPA, 146 F.3d 948 (D.C. Cir. 1998).
[122] 16 U.S.C. §§ 1531-1544 (2000).
[123] *Fund for Animals*, 322 F.3d at 730-31.
[124] *Id.* A species is endangered if it "is in danger of extinction throughout all or a significant portion of its range." *Id.* at 730.
[125] A species is threatened if it "is likely to become an endangered species within the foreseeable future." *Id.*
[126] *Id.* at 737-38.
[127] *Id.* at 732-34.

party has satisfied the standing requirements, "the balance of [the] analysis [is] not difficult at all."[128]

The Second, Fifth, Sixth, Ninth and Eleventh Circuits have all held that an intervenor need only meet FRCP 24(a)(2)'s requirements to intervene of right.[129]

The Second Circuit has focused on whether there is a "case or controversy" in the litigation at issue.[130] If so, "there [is] no need to impose the standing requirement upon the proposed intervenor."[131] At issue in *Brennan* was the constitutionality of an action brought by the Postal Service to prevent the Brennans from running a small mail delivery business in the downtown Rochester area.[132] The National Association of Letter Carriers ("NALC")[133] sought intervention after previously being permitted to participate as an amicus.[134] Because the court found that NALC had standing, but did not satisfy the "inadequacy of representation" component of FRCP 24(a)(2), it affirmed the district court's order denying intervention.[135]

In *Ruiz v. Estelle*,[136] the Fifth Circuit allowed two Texas state legislators to intervene in a suit concerning Texas prison conditions.[137] The court found that the Prison Litigation Reform Act ("PLRA")[138] gave the legislators "an unconditional right to intervene"[139] and thus, the

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[128] *Id.* at 734.

[129] San Juan County v. U.S., 420 F.3d 1197, 1204 (10th Cir. 2005).

[130] United States Postal Serv. V. Brennan, 579 F.2d 188, 190-92 (2nd Cir. 1978).

[131] *Id.* at 190.

[132] *Id.*

[133] NALC is a national labor union which acts as a bargaining agent for circa 200,000 employees of the Postal Service. *Id.*

[134] *Id.*

[135] *Id.*

[136] 161 F.3d 814 (5th Cir. 1998).

[137] *Id.* at 816. The litigation began more than twenty-five years ago. *Id.*

[138] 18 U.S.C. § 3626 (2000).

[139] *Ruiz*, 161 F.3d at 816-17. The PLRA states in pertinent part:

> Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a results of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such

intervention request fell under FRCP 24(a)(1).[140] While addressing the argument that the PLRA unconstitutionally allowed parties without standing to intervene,[141] the court found "better reasoning in those cases which hold that Article III does not require intervenors to possess standing."[142]

The Sixth Circuit takes a "rather expansive notion of the interest sufficient to invoke intervention of right."[143] According to the court in *United States v. Tennessee*,[144] implicit within this broad conception is that an intervenor need not have the same standing necessary to initiate a lawsuit.[145] Furthermore, the circuit rejected the belief that FRCP 24(a)(2) requires a specific legal or equitable interest,[146] and determines interest sufficiency on a fact specific basis.[147] The lawsuits underlying *Tennessee* were brought by the United States and other plaintiffs against the State of Tennessee focusing on the operation of its mental health system.[148] An association of nonprofit agencies that provided services to people with mental disabilities sought intervention of right and was denied by two district courts.[149]

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relief, and *shall have the right to intervene in any proceeding relating to such relief.*

18 U.S.C. § 3626(a)(3)(F) (emphasis added).

[140] *Ruiz*, 161 F.3d at 816-17. The court stated that intervention under FED. R. CIV. P. 24(a)(1) is "absolute and unconditional." *Id.* at 828.

[141] *Id.* at 828-33.

[142] *Id.* at 832. "These cases recognize that the Article III standing doctrine serves primarily to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination, and hold that Article III does not require each and every party in a case to have such standing." *Id.*

[143] United States v. Tenn., 260 F.3d 587, 595 (6th Cir. 2001) (citing Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997)).

[144] United States v. Tenn., 260 F.3d 587 (6th Cir. 2001).

[145] *Id.* (citing *Mich. State AFL-CIO*, 103 F.3d at 1245; Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991)).

[146] *Id.* at 595.

[147] *Id.*

[148] *Id.* at 590-91.

[149] *Id.* The Sixth Circuit affirmed the decisions of the lower courts, finding that the association was not timely in bringing its motions and did not establish an adequate substantial interest in either lawsuit. *Id.* at 596.

In *Yniguez v. Arizona*,[150] the Ninth Circuit addressed requests to intervene in an action determining if an amendment to the Arizona Constitution was in violation of the federal constitution.[151] The substantive effect of the amendment was to declare that English was the official language of the State of Arizona.[152] The appellate court affirmed the denial of the Arizona Attorney General's request to intervene,[153] but reversed the intervention denial of Arizonans for Official English ("AOE") and its spokesman.[154] The court cited *Sagebrush Rebellion, Inc. v. Watt*[155] for the proposition that in order for an individual to intervene in ongoing litigation, he or she need only meet the plain language of FRCP 24(a)(2).[156] However, in order for the intervenor to be the sole party on appeal, it must have standing in accordance with Article III.[157]

The Eleventh Circuit has analyzed the intervention-standing issue in a manner similar to that of the Ninth Circuit.[158] *Dillard v. Baldwin County Commissioners* was based on alleged violations of the Voting Rights Act[159] through inadequate representation of African-American voters on an Alabama county commission.[160] After remedial action was taken by a federal district court, three individuals sought to intervene as plaintiffs to oppose the remedial action.[161] Prior to finding that the facts alleged were sufficient to allow the claim of the potential intervenors' to survive a motion to dismiss,[162] the court went through an analysis of the

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[150] 939 F.2d 727 (9th Cir. 1991).
[151] *Id.* at 729.
[152] *Id.*
[153] *Id.* at 738-40 ("Only after the district court granted the Attorney General's request and then reached a result on the merits with which the Attorney General disagreed did that official decide that he would rather be a party after all. We will not accept such a reversal in position"). *Id.* at 738.
[154] *Id.* at 730-38.
[155] Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983).
[156] *Yniguez*, 939 F.2d at 731 (citing *Sagebrush Rebellion*, 713 F.2d at 527).
[157] *Id.* (citing Diamond v. Charles, 476 U.S. 54 (1986)). This was under the logic that if at least one party on both sides of the litigation does not have standing, the jurisdictional prerequisite of a live "case" or "controversy" was not met. *Id.*
[158] Dillard v. Baldwin County Comm'rs, 225 F.3d 1271, 1277-78 (11th Cir. 2000).
[159] *See* 42 U.S.C. § 1973 (2000).
[160] *Dillard*, 225 F.3d at 1273.
[161] *Id.*
[162] *Id.* at 1280-83.

court's past holdings concerning intervention and standing.[163] In summary, the court found that "a party seeking to intervene need not demonstrate standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit."[164]

IV. INSTANT DECISION

A. The Majority Opinion

The majority explicitly noted that "San Juan's standing argument raises a question of first impression . . . and an issue on which the circuits are divided."[165] In holding that a party seeking to intervene need not demonstrate Article III standing in addition to meeting the requirements of FRCP Rule 24(a)(2), the court concluded that this approach "is the better reasoned."[166] Recognizing that the Supreme Court "has not specifically

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[163] *Id.* at 1277-80.

[164] *Id.* at 1277-78 (citing Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989)).

[165] San Juan County v. U.S., 420 F.3d 1197, 1203 (10th Cir. 2005). The split among the circuits is due in large part to the failure of the Supreme Court to definitively address the issue in *Diamond v. Charles*. In addition to the Tenth Circuit in this case, "the Second, Fifth, Sixth, Ninth and Eleventh Circuits have all held that an intervenor need only meet Rule 24(a)(2)'s requirement that the intervenor have an interest in the litigation." *Id.* at 1204. "The Seventh, Eighth and D.C. Circuits have held that an intervenor must establish its own standing, in addition to meeting Rule 24(a)(2)'s interest requirement, before intervening." *Id.*

[166] *Id.* at 1205. "To qualify as a party with standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest that is concrete and particularized and actual or imminent." Arizonians for Official English v. Arizona, 520 U.S. 43, 64 (1997). "Rule 24(a)(2), on the other hand, provides that: upon timely application anyone shall be permitted to intervene in an action 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." *San Juan County*, 420 F.3d at 1204 (citing FED. R. CIV. P. 24(a)(2) (2005)).

resolved the issue,"[167] the majority implicitly asserted that the Court would agree with its holding.[168]

In order to substantiate this claim, the court cited language of the Supreme Court's decision in *Diamond v. Charles*,[169] that "an intervening defendant . . . would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally. But this *ability to ride "piggyback" on the [original defendant's] undoubted standing* exists only if the [original defendant] is in fact an appellant before the Court."[170] In other words, the Supreme Court assumes without arguing that a party could intervene ("piggyback") if another party with Article III standing is also before the court.[171] It is worth noting that the *Diamond* decision may have somewhat limited relevance due to the fact that the intervenor in that case "was the only party to the litigation pursuing an appeal."[172]

The majority held that "a party seeking to intervene under FRCP 24, *either as a matter of right or permissively*, need not establish its own standing in addition to meeting Rule 24's requirements, before the party can intervene so long as another party with constitutional standing on the same side as the intervenor remains in the case."[173]

After addressing the standing issue, the majority analyzed whether SUWA met the components of FRCP 24(a)(2).[174] The majority synthesized the rule as such:

> an applicant may intervene as of right if: (1) the application is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant's interest may as a practical

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[167] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs, 519 U.S. 248 (1997).
[168] *San Juan County*, 420 F.3d at 1204-05.
[169] 476 U.S. 54 (1986).
[170] *San Juan County*, 420 F.3d at 1205. The Tenth Circuit cited other Supreme Court decisions which, although not addressing the issue directly, seemed to assume that the requirements for intervention are only those explicitly listed in FED. R. CIV. P. 24. *Id.*
[171] *See generally Diamond*, 476 U.S. 54.
[172] *San Juan County*, 420 F.3d at 1205.
[173] *Id.* at 1206 (emphasis added).
[174] *Id.* at 1206-13.

> matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by existing parties.[175]

Because the timeliness of SUWA's intervention request was not disputed, the court "address[ed] only the remaining three parts of the inquiry."[176] In its discussion on the second requirement of FRCP 24(a)(2), the court found that the "direct, substantial, and legally protectable"[177] interest of SUWA was sufficiently related to the property or transaction at issue.[178] The court cited its past decision in *Utah Association of Counties v. Clinton*,[179] where the court stated that organizations whose purpose is the protection and conservation of wildlife "have a protectable interest in litigation that threatens those goals."[180] Furthermore, the court found salient the fact that SUWA had previously been involved with litigation, planning, and rulemaking focused on Salt Creek Canyon.[181] Finally, the court dismissed the argument that because SUWA does not assert an ownership interest in the Salt Creek Canyon, it cannot intervene.[182] Instead, the court held that a "direct user interest in [the] property . . . has always been . . . sufficient to support intervention.[183]

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[175] *Id.* at 1207 (citing Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1249 (10th Cir. 2001)).

[176] *Id.*

[177] *Id.*

[178] *Id.* at 1207-08.

[179] 255 F.3d 1246 (10th Cir. 2001).

[180] *San Juan County*, 420 F.3d at 1207.

[181] *Id.* at 1207-08.

[182] *Id.* at 1209.

[183] *Id.*. The court noted that

> SUWA's members and staff enjoy hiking, camping, birdwatching, study, contemplation, solicitude, photography, and other activities on NPS lands, and particularly on lands in Canyonlands National Park and Salt Creek Canyon. These health, recreational, scientific spiritual, educational, aesthetic, informational, and other interests will be directly affected and harmed by a decision granting San Juan County's R.S. 2477 claim, thereby overturning the NPS's closure order for Salt Creek Canyon beyond Peekaboo Spring and returning motorized vehicles to Salt Creek Canyon.

Id. at 1207.

The court then found that the interest existing could, as a practical matter, be impaired or impeded by an adverse decision on San Juan's quiet title action.[184] Again citing *Utah Association of Counties*,[185] the court stated that meeting this burden is minimal and a "court is not limited to consequences of a strictly legal nature."[186] A San Juan right-of-way would result in opening the Salt Creek road to motorized traffic,[187] lessening the amount of conservatory management options available to the NPS.[188] Even if there are alternative participatory options open to SUWA,[189] "the mere availability of alternative forums is not sufficient to justify denial of a motion to intervene."[190]

In the final portion of its opinion, the majority tackled the "minimal burden" of showing that one's interest would not be adequately represented.[191] The court found sufficient the six assertions of inadequacy put forth by SUWA.[192] Viewed in the context that the burden of showing

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[184] *Id.* at 1211.

[185] 255 F.3d 1246 (10th Cir. 2001).

[186] *San Juan County*, 420 F.3d at 1210.

[187] *Id.*

[188] *Id.* at 1210-11 (*i.e.* a prohibition on motor vehicle traffic).

[189] *Id.* at 1211.

[190] *Id.*

[191] *Id.* at 1211-12.

> An applicant may fulfill this burden by showing collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed in fulfilling his duty to represent the applicant's interest . . . . However, representation is adequate when the objective of the applicant for intervention is identical to that of the parties.

Id. (citing Coal. of Ariz./N.M. Counties for Stable Economic Growth, 100 F.3d 837, 844-45 (10th Cir. 1996)).

[192] The six reasons were: (1) SUWA had to sue the NPS originally to get the NPS to prohibit all vehicle traffic on the road; (2) SUWA's interst is narrowly focused on protecting Salt Creek Canyon from the damage and destruction caused by motorized vehicles; (3) the NPS has never finalized its preliminary administrative finding that San Juan's R.S. 2477 claim to a right-of-way was not valid; (4) in 2000 and 2001 the NP S permitted San Juan officials twice to drive in Salt Creek Canyon, despite the NPS's closure of the canyon to vehicle traffic; (5) the federal defendants oppose SUWA's intervention, not even recognizing that a conservation interest is implicated in this case; (6) the federal defendants might decide to settle this quiet title action. *San Juan County*, 420 F.3d at 1212-13.

inadequacy is made easier "when the party upon which the intervenor must rely is the government,"[193] the court reversed the district court's decision denying SUWA intervention of right.[194]

B. The Dissent

Judge Porfilio's dissent first focused on the issue of what constitutes "an interest relating to the property or transaction" within the language of FRCP 24(a)(2).[195] More specifically, he found the words "property" and "transaction" critical to a proper application of intervention as a matter of right.[196] While Porfilio attributed to the majority an interpretation of these terms rendering them interchangeable, he stated case law has established that "those words connote dissimilar concepts" and must be viewed as distinct from one another.[197]

Furthermore, as the complaint is based upon the Quiet Title Act ("QTA"), he asserted that the only purpose of the action is "to adjudicate a disputed title to real property in which the United States claims an interest."[198] Therefore, "it becomes clear that a litigable 'interest' in [this] action is dependant upon a claim to the land itself."[199] Porfilio supports his argument by citing *Kinscherff v. United States*, a case he believes "establishes the boundaries of the interest in land [property] required to pursue a quiet title action."[200] Although *Kinschereff* did not deal with intervention, the Tenth Circuit affirmed the district court's dismissal of the action because plaintiffs' "interest" in the property at issue was no more

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[193] *Id.* at 1212.
[194] *Id.* at 1213.
[195] *Id.* at 1214.
[196] *Id.* at 1215. For the relevant text of Rule 24, see *supra* note 58.
[197] *Id.* The "case law" referred to here is more thoroughly discussed below.
[198] *Id.* (citing the Quiet Title Act, 28 U.S.C. § 2409a(a) (2000)).
[199] *Id.*
[200] *Id.* (citing Kinscherff v. United States, 586 F.2d 159 (10th Cir. 1978)). In *Kinscherff*, the plaintiffs believed their "litigable interest" stemmed from New Mexico law entitling them to use the road as members of the public. *Id.* They also claimed that their ownership of land abutting a public highway meant that they had an interest in real property as required by 28 U.S.C. § 2409a (2000). *Id.* As stated earlier, the Tenth Circuit found these arguments unpersuasive and affirmed the district court's dismissal of the action. *Id.*

than what could be claimed by other members of the public at large.[201] In other words, because a private party cannot assert an "interest" in a public road for quiet title purposes and Porfilio frames the issue as a quiet title action concerning a public road, he argues that SUWA does not satisfy the plain language of FRCP 24(a)(2) requiring "an interest relating to the *property . . . which is the subject of the action.*"[202] Porfilio rejected the majority's "more lenient interpretation of the concept of 'interest.'"[203]

Porfilio next addressed the word "transaction" within FRCP 24(a)(2).[204] He distinguished the current case from others allowing intervention under Rule 24 because those cases "pertain to governmental decisions made in the process of *administration.*"[205] Thus, the intervenors in those cases "usually participated at some stage of the administrative process, making the word "transaction" in Rule 24(a)(2) the operative word."[206] SUWA could not successfully argue that it had the "interest" required to intervene because the subject of this action was not an administrative transaction.[207]

Porfilio further distinguished the interests involved. While the goal of SUWA is to protect public use of the land "potentially subject to [the] right of way," the more limited and focused issue pursued by San Juan County was a determination of whether or not it had legal title to the right-of-way.[208] Finally, Porfilio argued that in addition to the absence of an interest in the *property* here, "SUWA has no legally protected interest in the litigation itself."[209] The interest of SUWA is in how the Salt Creek Canyon is *used*, whereas the "*significantly protectable interest*" is the claim to title to the land.[210]

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[201] *Id.*at 1215.
[202] *Id.* (emphasis added).
[203] *Id.* at 1216.
[204] *Id.*
[205] *Id.* (emphasis added).
[206] *Id.* (citing Utah Ass'n of Counties v. Clinton, 255 F.3d 1246 (10th Cir. 2001); Coal. of Ariz./N.M. Counties for Stable Econ. Growth, 100 F.3d 837 (10th Cir. 1996)).
[207] *Id.* at 1216-1217.
[208] *Id.* at 1217.
[209] *Id.*
[210] *Id.* (citing Donaldson v. United States, 400 U.S. 517 (1971)).

V. COMMENT

The Tenth Circuit has now joined other Circuits that hold standing is not required to intervene under FRCP 24.[211] However, this holding should not be viewed as a measure of intervention ease. In fact, it appears that many courts and commentators have implicitly assumed this without further investigation.[212] Therefore, intervention has not necessarily gotten easier in the Tenth Circuit post-*San Juan Cty.*, or in the other federal appellate courts where not requiring standing to intervene has created a façade of interventionist accommodation.

The Eighth and D.C. Circuits in *South Dakota v. Ubbelohde*[213] and *Fund for Animals, Inc. v. Norton*,[214] are prime examples of how circuit courts applying the "intervention plus" requirement are still able to allow intervention[215] even though their standard is viewed by many as being antagonistic towards FRCP 24. Thus, because the definition of standing is fluid,[216] the standing doctrine is recognized as particularly malleable,[217] and the Supreme Court appears receptive to the standing issues of environmental groups in light of *Friends of the Earth v. Laidlaw Environmental Services*,[218] the effect of "intervention plus" on allowance of intervention could be negligible. As a result, academic and judicial attention on the standing-intervention issue has not been given the standing doctrine the attention it deserves.

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[211] *Id.* at 1203.

[212] *See generally* Karastelev, *supra* note 66; Stephanie D. Matheny, *Who Can Defend a Federal Regulation? The Ninth Circuit Misapplied Rule 24 By Denying Intervention of Right in* Kootenai Tribe of Idaho v. Veneman, 78 WASH. L. REV. 1067 (2003); and Stradling & Byers, *supra* note 66.

[213] 330 F.3d 1014 (8th Cir. 2003).

[214] 322 F.3d 728 (D.C. Cir. 2003).

[215] *Ubbelohde*, 330 F.3d at 1023-26; *Fund for Animals*, 322 F.3d at 737-38.

[216] *See generally* VINING, *supra* note 32; *see also* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 475 (1982) ("[T]he concept of Art. III standing has not been defined with complete consistency . . . .").

[217] *Id.*

[218] 528 U.S. 167 (2000).

A. The Expansion of Standing by the Supreme Court

Friends of the Earth[219] addressed whether environmental groups had standing to bring a citizen suit for civil penalties under the Clean Water Act ("CWA").[220] The Supreme Court found that the groups did have sufficient standing, holding that the injury focus during standing analysis should be on the citizens involved rather than the environment.[221] The environmental groups, through their members, demonstrated injury in fact[222] through affidavits focused on how Laidlaw's continuing practice of discharging large amounts of mercury into the Tyger River was causing harm to their "recreational, aesthetic, and economic interests."[223] Unlike the Court's more restrictive holding in *Lujan v. Defenders of Wildlife*,[224] the Court in *Friends of the Earth* was more accommodating to the legal argument put forth by the environmental groups.[225] Particularly, the Court noted that there was no demonstrable harm to the environment, yet this is not where the analysis must end.[226] The Court found acceptable the personally suffered aesthetic and economic injuries of the environmental group members and allowed the case to proceed.[227] While it is "logical to conclude that reasonable people would restrict their use of – and pay less for homes along – waters known to contain a toxic pollutant,"[228] the fact that the individuals here did so was not proven in a "concrete" and

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[219] *Id.*
[220] *Id.* at 173-75.
[221] *Id.* at 181 ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.").
[222] *Id.* at 180-84.
[223] *Id.* at 183-84. Injury was established through affidavits demonstrating that home values along the river had depreciated, and that individuals had refrained from fishing, camping, swimming, canoeing, wading, birdwatching, and picnicking in and near the river due to concern about Laidlaw's substance discharges. *Id.* at 181-83.
[224] 504 U.S. 555 (1992).
[225] *See generally* Kristen M. Shults, Comment, Friends of the Earth v. Laidlaw Environmental Services*: A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolution of Issues on Remand*, 89 GEO. L.J. 1001 (2001).
[226] *Friends of the Earth*, 528 U.S. at 181-82.
[227] *Id.* at 195.
[228] Shults, *supra* note 227, at 1012.

"particularized" manner.[229] Therefore, the Court significantly broadened the range, types, and scope of injuries parties can allege to meet the less demanding standing requirements.

B. Permitting Intervention in "Intervention-plus" Circuits

In the *South Dakota v. Ubbelohde* water apportionment case,[230] the Eighth Circuit found that the proposed intervenors "presented sufficient evidence of a threatened injury to give them standing" and ultimately allowed them to intervene.[231] By focusing on the arguments of an association representing members with interests in navigation, agriculture, and water treatment, the court found that a reduction in the flow of the Missouri River would impair their interests.[232] Specifically, a water flow reduction would interrupt navigation, threaten the ability of power plants to use the water for cooling, and decrease the amount of water available for community water supplies.[233]

In addition, the court recognized the "troublesome . . . effects that such a short-term reduction could have on wildlife."[234] While the opinion is unclear as to the weight accorded to the wildlife argument, its mere mention shows an "intervention-plus" circuit being cognizant of environmental issues and the peripheral matters which accompany them. Rather than applying a more rigorous test of standing,[235] the court was receptive to arguments premised on environmental-economic harms that were not certain to occur,[236] allowing the inference that even though *Friends of the Earth* was not cited by the court,[237] it was aware of its broad conception of standing.

Fund for Animals is yet another case involving environmental issues where an "intervention-plus" circuit has allowed intervention in

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[229] *See Friends of the Earth*, 528 U.S. at 180-84.
[230] 330 F.3d 1014 (8th Cir. 2003).
[231] *Id.* at 1025.
[232] *Id.* at 1024.
[233] *Id.*
[234] *Id.*
[235] *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[236] South Dakota v. Ubbelohde, 330 F.3d 1014, 1024-25 (8th Cir. 2003).
[237] *See id.* at 1014-33.

spite of the apparent demanding standing requirement.[238] In allowing the Natural Resources Department of Mongolia ("NRD") to intervene,[239] the D.C. Circuit found the NRD's economic argument persuasive.[240] To summarize, the NRD argued that if American hunters were unable to bring their trophies (argali sheep) home with them due to the sheep being placed on the endangered list, some hunters would decide not to go to Mongolia, resulting in decreased revenue for the Mongolian conservation program.[241] The court concluded, in a rather conclusory manner, that this potential economic impairment was sufficient for standing.[242] The court attempted to characterize the speculative economic argument as "a concrete and imminent injury,"[243] even though it closely resembled the "intention to travel or view" argument that the Supreme Court found too indefinite, and thus insufficient for standing purposes in *Lujan v. Defenders of Wildlife*.[244] Thus, it appears that the D.C. Circuit applied notions of "concrete and imminent" in the context of a post-*Friends of the Earth* standing atmosphere.

C. Denial of intervention in an apparently more receptive circuit

Further supporting the belief that the intervention test applied by a particular circuit is not determinative of whether intervention will in fact

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[238] *Fund for Animals*, 322 F.3d 728 (D.C. Cir. 2003). For a thorough explanation of the case, see *supra* notes 123-130 and the accompanying text.

[239] *Fund for Animals*, 322 F.3d at 737-38.

[240] *Id.* at 732-34.

> The NRD argues that it meets these [standing] requirements because fees paid by sports hunters are the primary source of funding for its argali conservation program. If the Fund succeeds in barring American hunters from bringing their trophies home, some hunters will not travel to Mongolia to hunt the argali, and the revenues that support the conservation program will decline.

Id. at 733.

[241] *Id.* at 733.

[242] *Id.* at 732-34 ("The NRD's argument is persuasive").

[243] *Id.* at 733.

[244] Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992).

be allowed is *United States v. Tennessee*.[245] Although only requiring an intervening party to meet the components of FRCP 24(a)(2), the Sixth Circuit found that the association of nonprofit agencies did not meet the requirements of FRCP 24(a)(2).[246] In doing so, the court ignored the "*relating to*" language from FRCP 24(a)(2).[247] Rather than acknowledge the economic interest connection to the federal government's suit that would require the State of Tennessee to operate its mental health system constitutionally and in accordance with federal statute, the court apparently decided that it would not apply its "expansive notion of the interest" precedent.[248] In failing to see how a violation of federal law may affect the level of funding provided by the State to the association members, the court applied a strict notion of FRCP 24(a)(2) that its past case law could not support.[249] *United States v. Tennessee* demonstrates how easily a court may deny intervention through a more stringent application of FRCP 24(a)(2), notwithstanding the court's own precedent.

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[245] United States v. Tenn., 260 F.3d 587 (6th Cir. 2001). For a more thorough description of the case see *supra* notes 145-151 and accompanying text.
[246] *Id.* at 596.
[247] *Id.* at 595-96 (emphasis added).
[248] *Id.* at 595.
[249] *Id.* at 595-96. In the court's discussion of the economic interest argument, it did not cite any past case law to support its decision. *Id.*

VI. CONCLUSION

While the significance of *San Juan County* is derived in large part due to its provision of precedent on the standing-intervention issue for the Tenth Circuit, a closer analysis of the case and case law cited by the court demonstrates the limited predictive value that resolving the standing-intervention issue provides to future litigants. The temptation in jurisdictions where courts have directly ruled on the standing-intervention question will be to view the issue as completely resolved for future parties. Unfortunately, this is not the case. Because the components of standing and intervention are based largely on discretionary judgments of a specific court considering a party's interest in the action, a thorough review of a jurisdiction's past precedent on both intervention and standing is essential to approximate a party's intervention chances.

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