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No PRP Left Behind: The Tenth Circuit Allows Non-Settling PRPs to Intervene as of Right in CERCLA Consent Decree Actions. United States v. Albert Investment Co.

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No PRP Left Behind: The Tenth Circuit Allows Non-Settling PRPs to Intervene as of Right in CERCLA Consent Decree Actions

United States v. Albert Investment Co.[1]

I. INTRODUCTION

When potentially responsible parties ("PRPs") settle with the government over CERCLA response costs,[2] the settling parties obtain immunity from any related contribution claims that might otherwise be brought against them. Because such settlements foreclose non-settling PRPs' contribution rights under CERCLA, the non-settling PRPs often seek to intervene in the settlement actions to oppose the proposed consent decrees and prevent potentially inequitable cost allocations. The federal courts have struggled for decades to determine whether non-settling PRPs may intervene as of right[3] in CERCLA consent decree actions between the government and settling PRPs. Historically, most courts have held that non-settling PRPs do not have a right to intervene in such cases.[4]

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[1] 585 F.3d 1386 (10th Cir. 2009).

[2] For a brief explanation of response costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *see infra* Part III.A, note 41 and accompanying text.

[3] Federal Rule of Civil Procedure 24 provides for two types of intervention: intervention as of right and permissive intervention. The court must permit anyone to intervene who meets the requirements for intervention as of right. Under permissive intervention, the court may exercise its discretion in determining whether to permit a person to intervene.

[4] *See, e.g.*, United States v. Acorn Eng'g Co., 221 F.R.D. 530, 534 (C.D. Cal. 2004); United States v. ABC Indus., 153 F.R.D. 603, 607 (W.D. Mich. 1993); United States v. Wheeling Disposal Serv., Inc., No. 92-0132, 1992 U.S. Dist. LEXIS 22425, *4 (W.D. Mo. Oct. 1, 1992); Arizona v. Motorola, Inc., 139 F.R.D. 141, 146 (D. Ariz. 1991); United States v. Beazer East, Inc., 1991 U.S. Dist. LEXIS 21436 (N.D. Ohio Mar. 6, 1991). Other cases contain dicta supporting the view that a non-settling PRP may not intervene as of right for lack of a legally protectable interest in its contribution claims against settling PRPs. *See* United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1184 (3d Cir. 1994); United States v. Mid-State Disposal, Inc., 131 F.R.D. 573, 577 (W.D. Wis. 1990); *see also* Adam Orford, *Break on Through: Tenth Circuit Allows Non-Settling PRP to Intervene in CERCLA Settlement Proceedings*, MARTEN LAW ENVIRONMENTAL NEWS, Dec. 23, 2009, http://www.martenlaw.com/newsletter/20091223-non-settling-prp-intervention.

However, the courts that have so held are all district courts.[5] The circuit courts of appeal that have confronted the issue have held that non-settling PRPs do have a right to intervene.[6] With its opinion in *United States v. Albert Inv. Co.*, the Tenth Circuit Court of Appeals joined the Eighth Circuit[7] in allowing non-settling PRPs to intervene as of right in CERCLA lawsuits in order to protect their contribution claims against the settling PRPs.[8] Recently, the Ninth Circuit followed suit in *United States v. Aerojet General Corp.*, an opinion that adopted the reasoning developed by the Eighth and Tenth Circuits.[9]

II. FACTS AND HOLDING

A. *The Double Eagle Superfund Site*

The Double Eagle Refining Company and Double Eagle Lubricants, Inc. (collectively "Double Eagle") leased a 12-acre lot from successive railroad companies for the operation of a waste oil refining facility.[10] In the course of its operations, Double Eagle contaminated the

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[5] *See* example cases cited *supra* note 4. In addition, the Third Circuit has indicated in dicta that it would decline to extend the right of intervention to non-settling PRPs. *Alcan Aluminum, Inc.*, 25 F.3d at 1184 ("Where the proposed intervenor has not yet settled with the government, it is unclear what, if any liability, it will have. Thus, any contribution right it might have depends on the outcome of some future dispute in which the applicant may, or may not, be assigned a portion of liability. In that situation, courts have properly found the interest of non-settlor applicants to be merely contingent."). For a discussion of *Alcan Aluminum, Inc.* and related precedent, *see infra* Part III.C, note 64 and accompanying text.

[6] United States v. Aerojet General Corp., 606 F.3d 1142 (9th Cir. 2010); *Albert Inv. Co.*, 585 F.3d at 1386 (10th Cir.); United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995).

[7] *See Union Elec. Co.*, 64 F.3d 1152.

[8] *See Albert Inv. Co.*, 585 F.3d at 1386. Other district court decisions also support this conclusion, including a recent decision by the Northern District of West Virginia that discusses *Albert Inv. Co.* United States v. ExxonMobil Corp., 264 F.R.D. 242, 246-47; *see also, e.g.*, United States v. ExxonMobil Corp., No. 07-60, 2007 U.S. Dist. LEXIS 95463 (D.N.H. Dec. 20, 2007); United States v. City of Glen Cove, 221 F.R.D. 370 (E.D.N.Y. 2004); United States v. Acton Corp., 131 F.R.D. 431, 434 (D.N.J. 1990).

[9] *Aerojet Gen. Corp.*, 606 F.3d at 1150-53.

[10] *Albert Inv. Co.*, 585 F.3d at 1389.

property with hazardous waste.[11] The Environmental Protection Agency ("EPA") placed the property on the National Priorities List in 1989 and the site became known as the Double Eagle Superfund Site ("the Site").[12] From 1989 to 1999, EPA and the Oklahoma Department of Environmental Quality ("ODEQ") expended over $30 million remediating surface and groundwater contamination at the Site.[13]

B. *Cost Recovery Action against Union Pacific*

Through a series of mergers,[14] the Union Pacific Railroad Company ("Union Pacific") acquired title to the Site in 2003. In 2006, the United States and the State of Oklahoma ("the government") filed a CERCLA[15] cost recovery suit against Union Pacific for "unreimbursed cleanup costs and natural resources damages" associated with the Site.[16] In that suit, which is still pending, the government seeks to hold Union Pacific jointly and severally liable for the entire damages from the Site.[17]

C. *Cost Recovery Action against the Settling PRPs*

The government filed a separate cost recovery action in the United States District Court for the Western District of Oklahoma against forty-five additional parties[18] potentially responsible for contamination at the

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] The Missouri-Kansas-Texas Railroad Company originally owned the lot and leased it to Double Eagle. *Id.* In 1989, the Missouri-Kansas-Texas Railroad Company merged with the Missouri Pacific Railroad Company. *Id.* The Missouri Pacific Railroad Company continued to lease the property to Double Eagle. *Id.* In 2003, the Missouri Pacific Railroad Company merged with the Union Pacific Railroad Company. *Id.*
[15] CERCLA stands for the Comprehensive Environmental Response, Compensation, and Liability Act, more commonly known as "Superfund." *See* 42 U.S.C. §§ 9601-9675 (2006).
[16] *Albert Inv. Co.*, 585 F.3d at 1389.
[17] *Id.*
[18] The court's opinion states there were forty-four defendants-appellees, *id.* at 1390, but the case caption lists forty-five defendants-appellees. *Id.* at 1386-87.

Site.[19] Those parties are Defendants-Appellees in the instant case.[20] The government sought reimbursement for the entire damages from these parties, as well.[21] Within a week of filing suit, and despite the fact that the statute of limitations on the government's "friendly suit"[22] had already expired, the government lodged a consent decree on June 27, 2008, memorializing its settlement agreement with the PRPs.[23] As part of the nearly $6.5 million settlement, the PRPs would receive immunity from contribution claims arising out of the Site.[24] This immunity would bar Union Pacific from recovering any of its costs from the PRPs. The proposed consent decree was subject to a thirty-day notice and comment period, during which Union Pacific filed the only comments in opposition.[25]

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[19] *Id.* at 1390. The parties are Albert Investment Company, Inc.; American Airlines, Inc.; Apac Arkansas, Inc.; Apac Oklahoma, Inc.; Bartlett Collins Company; Bell Helicopter; Bridgestone/Firestone North American Tire, LLC; Butler Aviation; CNH America LLC, f/k/a Case Corporation; Chevron Environmental Management Company; City of Amarillo; City of Oklahoma City; City of Tulsa; ConocoPhillips Company; CRST International, Inc.; Cummins Southern Plains, Inc.; Schlumberger Technologies Corporation Dowell Schlumberger; Emerson Electric Company; Fibercast; Ft. James Operating Company; General Tire, Inc.; Goodyear Tire & Rubber Company; Halliburton; Howard Pontiac GMC, Inc.; Hudiberg Chevrolet, d/b/a Hudiberg Investments; Illinois Tool Works, Inc.; IMCO d/b/a General Dynamics OTS, f/k/a Intercontinental Manufacturing Company, Inc.; Kawneer Company, Inc.; Marathon Electric; Natural Gas Pipeline; Oklahoma Department of Mental Health; Oklahoma Department of Transportation; Roadway Express, Inc.; Sears Roebuck and Company; Shell Oil Company; BC Imports, Inc., f/k/a Steve Bailey Honda; UE, Inc. f/k/a United Engines, Inc.; United Parcel Service, Inc.; Western Farmers; Willis Shaw Express, Inc.; Hilti, Inc.; Interstate Brands Continental Baking; Tyson Foods, Inc.; Wal-Mart Stores, Inc.; and Kraft General Foods, Inc. *Id.* at 1386-87.

[20] *Id.* at 1390.

[21] *Id.*

[22] A friendly suit is "a lawsuit brought solely for the purpose of settlement." Orford, *supra* note 4, at Background Section.

[23] *Id.*; Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act, 73 Fed. Reg. 41,118 (Dep't of Justice July 17, 2008) (indicating the date the proposed consent decree was filed).

[24] *Albert Inv. Co.*, 585 F.3d at 1390.

[25] *Id.*

On October 10, 2008, Union Pacific moved to intervene in the government's cost recovery suit against the PRPs.[26] Union Pacific claimed intervention as of right[27] or, in the alternative, permissive intervention.[28] Union Pacific argued that it had a significant interest in pursuing contribution claims against the settling PRPs and that the proposed consent decree would extinguish its opportunity to protect that interest.[29] The government and the settling PRPs opposed Union Pacific's motion.[30]

The district court denied Union Pacific's motion to intervene.[31] The court held that Union Pacific's interest was not legally sufficient to justify intervention as of right.[32] The court also refused to grant Union Pacific permissive intervention, citing concerns that "permitting Union Pacific to intervene at this stage would unduly delay the settlement and would prejudice the rights of Plaintiffs and Defendants."[33]

D. *The Appeal*

Union Pacific appealed to the Tenth Circuit Court of Appeals,[34] which reversed,[35] holding that Union Pacific's contribution rights constituted an interest sufficient to trigger intervention as of right.[36] The Court found that Union Pacific met the four requirements of intervention as of right: (1) its motion to intervene was timely,[37] (2) its contribution rights against the settling PRPs constituted a legally sufficient interest,[38]

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[26] *Id.*
[27] *See* FED. R. CIV. P. 24(a)(2).
[28] *Albert Inv. Co.*, 585 F.3d at 1390; *see* FED. R. CIV. P. 24(b)(1)(A).
[29] *Albert Inv. Co.*, 585 F.3d at 1390.
[30] *Id.*
[31] *Id.*
[32] *Id.* In reviewing the legislative history of CERCLA § 113(i), the district court concluded that Congress specifically intended to exclude non-settling PRPs from intervening to protect their contribution interests. *Id.* at 1392.
[33] *Id.* at 1390.
[34] *Id.*
[35] *Id.* at 1399.
[36] *Id.* at 1397.
[37] *Id.* at 1392.
[38] *Id.* at 1397.

(3) that interest would be impaired by the approval of the consent decree,[39] and (4) its interests were not adequately represented by the existing parties to the lawsuit.[40]

III. LEGAL BACKGROUND

A. *CERCLA*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was originally enacted in 1980 and was subsequently amended in 1986.[41] The Act empowers EPA to remediate hazardous waste sites using monies from the Superfund.[42] CERCLA also provides a cost recovery framework designed to reimburse the Superfund and allocate cleanup costs to the parties who are potentially responsible for the contamination, when possible.[43] CERCLA contains two cost recovery mechanisms. The first, CERCLA § 107, "authorizes private parties and state and federal governments to recover costs of a cleanup" from PRPs.[44] In the instant case, the government's lawsuit against the settling PRPs was a § 107 claim.[45] The second mechanism, CERCLA § 113, allows a PRP subject to liability under a §107 claim to seek contribution from "any other person who is liable or potentially liable under section [107]."[46] At issue in this case was the potential extinguishment of Union Pacific's right to seek contribution from the settling PRPs under § 113.[47]

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[39] *Id.* at 1399.

[40] *Id.* Because the court held that Union Pacific could intervene as of right, it did not address the district court's denial of Union Pacific's motion for permissive intervention. *Id.*

[41] U.S. EPA, CERCLA Overview, http://www.epa.gov/superfund/policy/cercla.htm (last visited Nov. 10, 2010).

[42] *Id.*

[43] U.S. EPA, Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), http://www.epa.gov/lawsregs/laws/cercla.html (last visited Nov. 10, 2010).

[44] *Albert Inv. Co.*, 585 F.3d at 1391 (citing 42 U.S.C. § 9607(a) (2006)).

[45] *Id.*

[46] *Id.* (quoting 42 U.S.C. § 9613(f)(1)).

[47] *Id.*

B. *Intervention*

To preserve this contribution right, Union Pacific moved to intervene in the lawsuit that generated the proposed consent decree.[48] Generally, intervention is governed by Federal Rule of Civil Procedure 24. Rule 24 contains two mechanisms: intervention of right and permissive intervention.[49] For intervention of right under Rule 24(a),

> the court *must* permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.[50]

The standard of Rule 24(a)(2) governs in the instant case.[51] From Rule 24(a), the courts have elucidated four requirements for intervention as of right: "(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 matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by existing parties."[52] The movant carries the burden of proof for all four elements.[53]

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[48] *Id.* at 1390.

[49] FED. R. CIV. P. 24.

[50] FED. R. CIV. P. 24(a) (emphasis added). A person who does not qualify for intervention of right may request the court's permission to intervene under Rule 24(b).

[51] *See Albert Inv. Co.*, 585 F.3d at 1390 ("On October 10, 2008, Union Pacific filed a motion to intervene as of right in the underlying action pursuant to Fed. R. Civ. P. 24(a)(2).").

[52] *Id.* at 1391 (quoting Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1249 (10th Cir. 2001)).

[53] *See id.* at 1392; *see also* United States v. Union Elec. Co., 64 F.3d 1152, 1157 (8th Cir. 1995) ("[T]he intervenor bears the burden of showing inadequate representation by existing parties under Rule 24(a)(2).").

CERCLA also contains a provision establishing intervention as of right in CERCLA lawsuits.[54] This provision is "nearly identical" to Rule 24(a)(2).[55] Section 113(i) provides that

> [i]n any action commenced under this chapter [CERCLA] . . . in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.[56]

The only difference between Rule 24(a)(2) intervention and CERCLA § 113(i) intervention is the burden of proof regarding the fourth element: that the existing parties do not represent the movant's interests.[57] Under the Federal Rules, the movant must establish this element; under CERCLA, the burden falls on the State.[58]

The Tenth Circuit has developed standards to determine what interests are legally sufficient to give rise to intervention as of right. In *San Juan County v. United States*,[59] the court laid down its "practical judgment standard" for determining what constitutes sufficient interest.[60] In that case, the court held that "at [a] minimum, '[t]he applicant must have an interest that could be adversely affected by the litigation. But practical judgment must be applied in determining whether the strength of the interest and the potential risk of injury to that interest justify

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[54] 42 U.S.C. § 9613(i) (2006).
[55] *Albert Inv. Co.*, 585 F.3d at 1391.
[56] 42 U.S.C. § 9613(i).
[57] *Albert Inv. Co.*, 585 F.3d at 1392; *Union Elec. Co.*, 64 F.3d at 1157 ("[T]he intervenor bears the burden of showing inadequate representation by existing parties under Rule 24(a)(2).").
[58] *Albert Inv. Co.*, 585 F.3d at 1392.
[59] 503 F.3d 1163 (10th Cir. 2007) (en banc).
[60] *See Albert Inv. Co.*, 585 F.3d at 1392.

intervention.'"[61] In *WildEarth Guardians v. U.S. Forest Service*,[62] the court applied the practical standard to economic interests, holding that "the threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest."[63]

C. *Split of Authority Regarding Intervention of Non-Settling PRPs*

There is a split of federal authority regarding whether non-settling PRPs may intervene as of right in CERCLA settlements. The Eighth Circuit has held that non-settling PRPs may intervene as of right.[64] However, the Third Circuit and various district courts have declined to adopt the Eighth Circuit view, holding instead that non-settling PRPs do not qualify for intervention by right.[65]

In *United States v. Union Elec. Co.*, the Eighth Circuit considered a lawsuit similar to the instant case, wherein a group of non-settling PRPs moved to intervene in the government's cost recovery suit to prevent the lodging of a consent decree that would immunize the settling PRPs from the non-settlors' potential contribution claims. The court reviewed two conflicting precedents regarding whether the non-settlors were entitled to intervention by right. First, the court considered the "majority" position epitomized by dicta of the Third Circuit in *United States v. Alcan Aluminum, Inc.*[66] and various district court decisions[67] that non-settling PRPs may not intervene by right.[68] In *Alcan*, the Third Circuit considered the policy goals underlying CERCLA and legislative intent to determine whether to grant intervention as of right. The Third Circuit—as well as the district courts following this analytical theory—ultimately concluded

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[61] *Id.* (quoting *San Juan County*, 503 F.3d at 1199).
[62] 573 F.3d 992 (10th Cir. 2009).
[63] *Albert Inv. Co.*, 585 F.3d at 1392 (internal quotations omitted) (quoting *WildEarth Guardians*, 573 F.3d at 996).
[64] *Union Elec. Co.*, 64 F.3d at 1170.
[65] United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1183-84 (3d Cir. 1994). *See, e.g.*, United States v. Acorn Eng'g Co., 221 F.R.D. 530, 533-34 (C.D. Cal. 2004).
[66] *Alcan Aluminum, Inc.*, 25 F.3d at 1183-84.
[67] *See* United States v. Union Elec. Co., 64 F.3d 1152, 1163-64 (8th Cir.) (giving myriad district court opinions tracking the Third Circuit's reasoning in *Alcan*).
[68] *Id.* at 1170 (the court's holding).

that allowing intervention of right would be inconsistent with CERCLA's goal of promoting early settlement.[69] "[A]llowing intervention to protect contribution claims would result in parties refusing to enter into meaningful settlement negotiations."[70] Thus, these courts rejected intervention by right for non-settling PRPs as contrary to CERCLA's purpose.

The Eighth Circuit declined to apply this precedent,[71] electing instead to adopt the reasoning of *United States v. Acton Corp.*[72] In analyzing CERCLA intervention, the *Acton* court refused to rely on policy arguments and legislative history.[73] The court reasoned that such factors are appropriately considered only when a statute is ambiguous.[74] Because the *Acton* court found CERCLA's terms unambiguous, the court looked to the plain meaning of the statutory language only.[75] The Eighth Circuit agreed, noting that while "Congress has identified a number of factors as relevant to intervention in CERCLA litigation pursuant to § 113(i), policy and legislative intent are not among them."[76] The Eighth Circuit analyzed the plain language of the statute: "CERCLA's intervention provisions unambiguously provide for intervention by 'any person' when such person meets the requirements of the statute."[77] Unlike the *Alcan* court, the Eighth Circuit did not find intervention as of right by non-settlors to be inconsistent with CERCLA's other provisions.[78] The Eighth Circuit

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[69] *Id.* at 1163 (CERCLA expressly subordinates "contribution claims [to] the desire for early de minimis settlements and finality of settlement judgments."); *Alcan Aluminum, Inc.*, 25 F.3d at 1184 ("Our conclusion is in line with the policies behind the SARA amendments. Congress amended CERCLA because it wanted to encourage early settlement.").

[70] *Union Elec. Co.*, 64 F.3d at 1164 (discussing United States v. Vasi, 22 Chem. Waste Lit. Rep. 218, 219 (N.D. Ohio 1991)).

[71] *Id.*

[72] 131 F.R.D. 431 (D.N.J. 1990).

[73] *Union Electric Co.*, 64 F.3d at 1164 (citing *Acton*, 131 F.R.D. at 433).

[74] *Id.* (citing *Acton*, 131 F.R.D. at 433).

[75] *Id.* (citing *Acton*, 131 F.R.D. at 433-34).

[76] *Id.* at 1166.

[77] *Id.* at 1165 (citing 42 U.S.C. § 9613(i) (2006)).

[78] *Id.*

found no contradiction between allowing intervention under CERCLA § 113(i) and the purpose of § 113(f)(2) to promote prompt settlement.[79]

> There is no contradiction among these provisions requiring resort to legislative intent. This court finds that all can be read together and each given its proper effect. Under this reading, the incentive to prompt settlement in § 113(f)(2) remains intact; it simply is not the sole purpose of § 113 taken as a whole. By its terms, subsection 113(f)(1) provides for contribution, subsection 113(f)(2) provides for the termination of that interest as to settling PRPs, and subsection 113(i) provides for intervention to protect that and other interests of persons affected by the litigation.[80]

The Eighth Circuit applied the four elements of intervention[81] to the facts of the case and concluded that the movants were entitled to intervention by right. The court found the motion was timely.[82] The court also found that the movants had an interest relating to the transaction which was the subject of the lawsuit: "[t]he threat of cutting off contribution rights of non-settling PRPs creates a direct and immediate interest on the part of non-settling PRPs in the subject matter of the present litigation."[83] The movants' interest was to be impaired in that "the prospective intervenors . . . [stood] to gain or lose by the direct legal operation of the consent decree, which would subject their contribution claims to the bar found in § 113(f)(2)."[84] In addition, the court found the existing parties to the lawsuit did not adequately represent the movants' interests.[85] "Both the existing plaintiffs and existing defendants have an interest in entry of the Consent Decree that is contrary to the interest of the

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[79] *Id.* at 1166.
[80] *Id.*
[81] *See* Part III.B, *supra* note 48 and accompanying text.
[82] *Union Elec. Co.*, 64 F.3d at 1158-59.
[83] *Id.* at 1167.
[84] *Id.*
[85] *Id.* at 1168-70.

intervenors who oppose entry of the Consent Decree on the ground that it is unfair to them."[86]

IV. INSTANT DECISION

The court reviewed *de novo* the denial of Union Pacific's motion to intervene as of right[87] under Federal Rule of Civil Procedure 24 and CERCLA § 113.[88] The court analyzed each prong of establishing an intervention right—timeliness, sufficient interest, impairment of interest, and adequate representation—and determined that Union Pacific satisfied each requirement.[89] Thus, Union Pacific had a right to intervene in the government's lawsuit against the settling PRPs.[90]

A. *Timeliness*

The timeliness of Union Pacific's motion to intervene was not disputed.[91] Union Pacific filed its motion not long after the lawsuit was filed and before any scheduling order was entered in the case.[92] As a result, the court found that Union Pacific's motion to intervene was timely.[93]

B. *Sufficient Interest*

The sufficiency of Union Pacific's interest was the central dispute in the case.[94] The court first determined that Union Pacific had a present interest: the right to seek contribution from the settling PRPs.[95] This

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[86] *Id.* at 1170.

[87] United States v. Albert Inv. Co., 585 F.3d 1386, 1390 (10th Cir. 2009). Because of its conclusion regarding Union Pacific's right to intervene, the court did not address Union Pacific's alternative argument regarding permissive intervention. *Id.* at 1399 ("Because we find that Union Pacific has a right to intervene, we do not reach the district court's denial of the motion for permissive intervention.").

[88] *Id.* at 1391.

[89] *See id.* at 1392-99.

[90] *Id.* at 1399.

[91] *Id.* at 1392.

[92] *Id.*

[93] *See id.* at 1392.

[94] *Id.*

[95] *Id.* at 1397.

interest related to the subject matter of the lawsuit.[96] Under *San Juan County*, Union Pacific met the threshold requirement because its interest could be adversely affected by the lawsuit.[97] Should the consent decree be approved, Union Pacific's right to seek contribution from the settling PRPs would be extinguished.[98]

Union Pacific also satisfied *San Juan County*'s practical judgment standard.[99] In weighing the strength of Union Pacific's interest and its potential risk of injury, "both point[ed] toward intervention."[100] With respect to the strength of Union Pacific's interest, the government seeks approximately $23 million in cleanup costs from Union Pacific.[101] This amount of potential liability constitutes a significant potential injury to Union Pacific.[102] In providing for contribution claims, CERCLA recognizes that PRPs have an important interest in seeking contribution from other PRPs to share such a burden.[103] With respect to the potential risk of injury to Union Pacific, "the risk of injury is great because judicial approval will automatically cut off the right to seek contribution from the settling defendants as PRPs."[104]

Just as Union Pacific's interest qualified as legally sufficient under the *San Juan* County standard, it also comported with *WildEarth Guardians*.[105] Because Union Pacific's interest is monetary, and thus economic in nature, it is "certainly sufficient for intervention as of right."[106] In summary, the court applied the *San Juan County* and *WildEarth Guardian* standards to the intervention requirement of sufficient interest and held that Union Pacific's interest in exercising its contribution right against the settling defendants was sufficient to give rise to intervention as of right.[107]

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[96] *Id.*
[97] *Id.* at 1398.
[98] *See* 42 U.S.C. § 9613(f)(2) (2006).
[99] *Albert Inv. Co.*, 585 F.3d at 1398.
[100] *Id.*
[101] *Id.*
[102] *See id.*
[103] *Id.*
[104] *Id.*
[105] *See id.*
[106] *Id.*
[107] *See id.* at 1392-98.

The court also considered and dismissed four arguments made by the government and the settling defendants. First, Appellees argued that the CERCLA contribution right was "qualified" because the statute makes it unavailable against settling defendants.[108] They interpreted CERCLA § 113(f) to mean that "[b]ecause CERCLA itself circumscribes the contribution right that it creates . . . Union Pacific's contribution right has always been impaired."[109] The court disagreed, holding that the contribution right is available to Union Pacific unimpaired until the point at which the defendants complete their settlement with the government.[110] The impairment imposed by the statute is triggered by an event—the settlement—which only serves to advance Union Pacific's argument that "approval of the consent decree will certainly impair [its] right."[111]

Second, Appellees argued that the CERCLA intervention provision (§ 113(i)) is ambiguous, and that because of this ambiguity, it was appropriate for the court to consider legislative history the Appellees claimed required the denial of intervention as of right.[112] The court held that § 113(i) was not ambiguous, and that in any event, the legislative history did not support the denial of intervention as of right.[113] Appellees failed to identify what language in § 113(i) was allegedly ambiguous,[114] and the court rejected their argument that conflicting case law interpreting the provision was sufficient to constitute a prima facie case of ambiguity.[115] The court found that "Section 113(i) is clear: any intervenor must have an interest in the ongoing litigation, such that the outcome of that case may impair that interest. Although this language is very broad, a statute's breadth does not make it ambiguous."[116]

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[108] *Id.* at 1393 (citing Brief of Federal and State Appellees at 18, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267), 2009 WL 1064876).
[109] *Id.* (citing Brief of Federal and State Appellees at 18-19, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).
[110] *Id.* at 1394.
[111] *Id.*
[112] *Id.* (citing Brief of Federal and State Appellees at 21-38, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).
[113] *Id.* at 1395.
[114] *Id.* at 1394.
[115] *Id.* at 1395.
[116] *Id.*

The court was similarly unconvinced by the legislative history upon which Appellees relied.[117] Appellees pointed to proposed legislation that would have narrowed the CERCLA intervention right,[118] but these versions were never passed.[119] Because Congress declined to pass the proposed legislation, the court concluded that "Congress intended the broad intervention right that it created."[120] Appellees also argued that "general legislative intent" to encourage early settlement was incompatible with intervention as of right in this context.[121] They claimed that "[i]f non-settling PRPs could intervene in the action underlying the settlement between other PRPs and the government, litigation expenses would increase and . . . settlement incentives would decrease."[122] The court determined that intervention *was* consistent with the promotion of prompt settlement.[123] It concluded that allowing "a brief delay for the court to consider a non-settling PRP's interest is not inconsistent with a general goal of early settlement and might actually result in decreased litigation costs."[124] Moreover, the court found that any concerns regarding delays caused by intervention were addressed by the timeliness requirement.[125] The court also considered Congress' goal of ensuring that cleanup costs are "borne by those responsible for the contamination"[126] and found that intervention furthers that goal by allowing intervening parties to argue against a proposed settlement that would unfairly allocate costs.[127]

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[117] *See id.*

[118] *Id.* (citing Brief of Federal and State Appellees at 23-24, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267) (citing H.R. REP. NO. 99-253(III), at 24 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3047)).

[119] *Id.*

[120] *Id.*

[121] *Id.* (citing Brief of Federal and State Appellees at 28-29, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).

[122] *Id.* (citing Brief of Federal and State Appellees at 28, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).

[123] *Id.* at 1396.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 1397.

[127] *Id.*

Third, Appellees argued that Union Pacific's interest was too "remote, speculative and contingent" to justify intervention.[128] Appellees pointed out that in order to actually recover funds from the settling defendants, three variables must coincide: "Union Pacific must first be found liable in the separate suit, be held liable for a disproportionate share of the cleanup costs, and then establish the settling defendants' liability."[129] The court dismissed the speculation argument because Union Pacific was not seeking to protect a "specific dollar value that it might obtain from the settling defendants."[130] Rather, Union Pacific sought to protect a "substantive right that currently exists"—the right to seek contribution from the settling defendants.[131]

Fourth, Appellees argued that Union Pacific's failure to participate in settlement negotiations supported denial of intervention.[132] The court found that Union Pacific's decision not to settle was irrelevant.[133] Union Pacific's intervention right arose when the other PRPs settled and the government filed a lawsuit in order to lodge the consent decree.[134] Its timely motion to intervene preserved its interest in the suit and its right to intervene, regardless of its settlement strategy.[135]

Thus, the court held that Union Pacific's right to seek contribution from the settling PRPs constituted a legally sufficient interest for intervention as of right.

C. *Impairment of Interest*

The court then examined whether the disposition of the case (the finalization of the consent decree) would impair Union Pacific's "ability to

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[128] *Id.* (citing Brief of Federal and State Appellees at 44-46, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).
[129] *Id.* (citing Brief of Federal and State Appellees at 44-45, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).
[130] *Id.*
[131] *Id.*
[132] *Id.* (citing Brief of Federal and State Appellees at 42-43, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).
[133] *Id.*
[134] *Id.*
[135] *Id.*

protect its interest, its statutory right to seek contribution."[136] Under CERCLA § 113(f)(2), "a settling party 'shall not be liable for claims for contribution regarding matters addressed in the settlement.'"[137] Thus, the finalization of the settlement would bar Union Pacific from seeking contribution from the settling PRPs.[138] The court concluded that "as a practical matter, Union Pacific's interest may be impeded by the disposition of the case," which satisfies the impairment of interest requirement.[139]

The government argued that denying intervention would minimally affect Union Pacific since intervention would merely allow Union Pacific to brief the court, and not to veto the proposed settlement.[140] The court found that this argument "misstate[d] the purpose and requirements of intervention as of right."[141] The possibility that the court might decide against Union Pacific's interest did not make Union Pacific any less interested in, or affected by, the outcome of the case.[142] The court noted that Union Pacific was "only asking for a seat at the table"—the opportunity to "fully participate as a party in the litigation."[143]

The government also claimed that the notice and comment mechanism was "an adequate substitute for intervention."[144] The court disagreed because the notice and comment mechanism lacks the protections of intervention.[145] The government and the court may legally disregard comments received because the mechanism is not mandated by statute.[146] "The failure to consider adequately an intervenor's objections,

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[136] *Id.* at 1398.
[137] *Id.* (quoting 42 U.S.C. § 9613(f)(2) (2006)).
[138] *Id.*
[139] *Id.*
[140] *Id.* (citing Brief of Federal and State Appellees at 39, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* (citing Brief of Federal and State Appellees at 39, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6267)).
[145] *Id.* at 1398-99.
[146] *Id.* at 1399.

on the other hand, is subject to appellate review."[147] Therefore, Union Pacific is entitled to the procedural protections of intervention as of right.

D. *Adequate Representation*

Under CERCLA, the government must prove that the existing parties to the litigation adequately represent the movant's interests.[148] The government conceded that Union Pacific's interests were not adequately represented by the existing parties to the case.[149] Thus, the court found that Union Pacific met the fourth requirement for intervention as of right.

V. COMMENT

United States v. Albert Inv. Co. represents a step in the right direction toward allowing non-settling PRPs to intervene in CERCLA consent decree actions. The "majority" view that a non-settling PRP's contribution right is too speculative an interest to give rise to a claim for intervention as of right has outlived its utility. Allowing intervention as of right is more likely to achieve just results while serving the overarching policy goals of CERCLA.

Opponents of allowing intervention as of right argue that "allowing intervention by nonsettlors would encourage recalcitrance by PRP[s], who could refuse to engage in meaningful settlement negotiations and then stall the court's approval of the consent decree by obtaining intervention."[150] While possible, this result does not seem likely. Absent compelling evidence brought by the non-settling PRP (in which case intervention has served its function in preventing an unjust settlement), common sense dictates that a court would not lightly reject a proposed consent decree because of an intervenor's objection. Practical considerations of efficiency and expediency put intervenors at a significant disadvantage in arguing against the proposed consent decree. At this stage of the lawsuit, the government and the settling parties have concluded their negotiations

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[147] *Id.*
[148] *Id.*
[149] *Id.* (citing Brief of Federal and State Appellees at 16 n.7, *Albert Inv. Co.*, 585 F.3d 1386 (No. 08-6257)); *see* 42 U.S.C. § 9613(i) (2006).
[150] 61 AM. JUR. 2d *Pollution Control* § 1325 (2010).

and the comment period has closed. Rejecting the proposed consent decree at this stage could undo every goal the lawsuit has realized, resulting in additional work for the parties and the court.

As a result, the court has taken pains to clarify that the right of intervention entitles the non-settling PRP to no more than an opportunity to be heard. In *United States v. ExxonMobil Corp.*, "the court cautioned that the Intervenors faced 'a high hurdle in objecting to the proposed Consent Decree.'"[151] The court clarified that it was not granting the intervenor "veto power over the final settlement," but merely "a seat at the table, and an opportunity to speak its piece."[152] It seems unlikely that the court would reject the proposed consent decree (or that an appellate court would overturn the district court on appeal) absent genuine concerns regarding the decree's fairness, in which case the settling parties would have no legitimate basis for opposing a modification.

Consequently, it seems equally as unlikely that the availability of intervention would encourage an intervenor to refuse to engage in settlement discussions given the difficulty of persuading the court to reject the proposed consent decree. If the intervenor most likely will not succeed in challenging the proposed consent decree, foregoing the opportunity to exert influence over the settlement process in reliance on intervening later is an unreliable strategy. Rather, it is more likely that parties who rejected settlement for reasons unrelated to the availability of intervention will exercise the intervention right.

Allowing intervention as of right may increase the transactional costs of consent decree actions if more non-settling PRPs move to intervene as a result of the precedent set by *Union Electric Co.* and

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[151] Meline MacCurdy, *Let Me In: District Court Allows Non-Settling Parties to Intervene in CERCLA Consent Decree*, MARTEN LAW ENVIRONMENTAL NEWS, Feb. 6, 2008, http://www.martenlaw.com/newsletter/20080206-non-settling-parties (quoting United States v. ExxonMobil Corp., No. I:07-cv-00060, 2007 U.S. Dist. LEXIS 95463, at *17 (D.N.H. Dec. 20, 2007)).

[152] *Id.* (quoting *ExxonMobil Corp.*, 2007 U.S. Dist. LEXIS 95463, at *18). In this sense, Union Pacific's victory in this case is limited given the likely difficulty of persuading the court to reject the proposed consent decree. On the other hand, by gaining the right to intervene, Union Pacific has also secured the right to appeal. The right to appeal serves as an additional procedural safeguard as well as a (limited) strategic tool to a PRP negotiating settlement with the government and seeking contribution from fellow PRPs.

followed by *Albert Inv. Co.*[153] Adding an intervenor to a case will inevitably result in some delay and may necessitate supplementary briefing, which requires additional expenditures of time and funds. It is also possible that a losing intervenor would appeal. However, these increased transactional costs are worth the price of a fair settlement given CERCLA's policy goals.

Intervention as of right furthers CERCLA's primary policy goal: to deter hazardous waste contamination.

> [I]mposing liability has forward-looking deterrent effects in addition to its providing a method to finance cleanup of existing sites. Philip Cummings, the chief counsel of the Senate Environmental Committee when CERCLA was drafted, has written that this deterrent effect is at the heart of the reasons for passage: "CERCLA," he writes, "is not primarily an abandoned dump cleanup program, although that is included in its purposes." Instead, "[t]he main purpose of CERCLA is to make spills or dumping of hazardous substances less likely through liability, enlisting businesses and commercial instincts for the bottom line in place of traditional regulation. It was a conscious intention of the law's authors to draw lenders and insurers into this new army of quasi-regulators, along with corporate risk managers and boards of directors. [Cummings, Completing the Circle, Envtl. Forum 11 (Nov./Dec. 1990).]"[154]

CERCLA effectuates deterrence by subjecting each PRP to liability for cleanup costs and natural resources damages resulting from pollution caused by that PRP. The most effective way to accomplish deterrence is to fairly apportion liability according to each PRP's level of responsibility for the contamination. When the consequences meted to a PRP proportionally mirror the PRP's behavior, the PRP has incentive to change

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[153] *See* Orford, *supra* note 4 (inferring that "it is possible that more non-settling PRPs will challenge settlement agreements").

[154] ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 394 (6th ed. 2009).

that behavior because it can control the outcome. Joint and several liability[155] can muddy the waters by imposing liability regardless of the PRP's level of fault. In the event apportionment is not possible, the PRP is liable for the "entire obligation"[156] regardless of whether that PRP contributed ten drums or ten tons worth of waste to the site. Section 113's cost recovery provision tempers the effect of joint and several liability by allowing PRPs to sue each other for contribution to even the score. Without intervention as of right, that contribution right can be severed without affording the non-settling PRP the opportunity to recover a fair amount of costs from fellow PRPs. Such a result would detract from the deterrence mechanism established by CERCLA by divorcing a PRP's behavior from that behavior's consequences.

The Supreme Court has acknowledged this "fairness" principle of equating the extent of the PRP's contamination to the amount of costs owed by the PRP. In its recent opinion in *Burlington Northern & Santa Fe Railroad Co. v. United States*,[157] the Court held that "where there is a reasonable basis for apportionment, PRPs are only responsible for their own contributions to contamination (leaving the government holding the bag for any orphan share)."[158] This holding creates a strong incentive for the government to determine that liability cannot be apportioned in order to avoid unfunded orphan shares.[159] Intervention as of right counterbalances that incentive by allowing a non-settling PRP to hold the government accountable for apportioning liability when possible, thus strengthening CERCLA's deterrent effect.

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[155] "[E]ach liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties." BLACK'S LAW DICTIONARY 933 (8th ed. 2004).

[156] *Id.*

[157] 129 S. Ct. 1870 (2009).

[158] Orford, *supra* note 4 (citing *Burlington N.*, 129 S. Ct. at 1880-81).

[159] In fact, Union Pacific raised this issue in its comments to the proposed consent decree, arguing that the government failed to rationally apportion liability based on contribution to the contamination. Union Pacific Co.'s Motion to Intervene, Ex A, United States v. Albert Inv. Co., No. 08-CV-637 (W.D. Okla. Oct. 10, 2008). *See also* Orford, *supra* note 4.

VI. CONCLUSION

With its opinion in *United States v. Albert Co.*, the Tenth Circuit strengthens the "minority" position endorsed by the Eighth Circuit[160] of allowing non-settling PRPs to intervene as of right in CERCLA § 107 consent decree litigations between the government and settling PRPs. The court found that Union Pacific met the requirements for intervention under Federal Rule of Civil Procedure 24 and CERCLA § 113 by (1) timely moving to intervene in the consent decree action (2) in order to protect its direct interest in recovering costs from the settling PRPs (3) when that interest would be extinguished by the entry of the decree (4) and no party in the action adequately protected Union Pacific's interests. The court also held that the intervention mechanism is consistent with CERCLA's other provisions and the statute's goal of encouraging prompt settlement. In the interest of furthering the statute's overarching goal of deterring future contamination, CERCLA must continue to promote equitable distribution of cleanup costs among PRPs. Allowing intervention as of right in consent decree actions provides non-settling PRPs a chance to be heard regarding a potentially inequitable settlement before the non-settlors' contribution rights are severed by that settlement. Thus, the Tenth Circuit's decision in *Albert Co.* promotes equitable distribution of cleanup costs among PRPs by bringing all parties to the litigation table. Granting non-settlers an opportunity to challenge proposed consent decrees is a step in the right direction toward a more equitable implementation of CERCLA.

KATIE JO WHEELER

[160] *See* United States v. Union Elec. Co., 64 F.3d 1152, 1170 (8th Cir. 1995).