UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-4260

San Juan County, Utah,

v.

United States of America, *et al.*,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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the Grand Canyon Trust

December 21, 2004

CORPORATE DISCLOSURE STATEMENT

SOUTHERN UTAH WILDERNESS ALLIANCE, THE WILDERNESS SOCIETY, AND THE GRAND CANYON TRUST have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States.

Respectfully submitted December 21, 2004.

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RULE 28.2(C)(1) STATEMENT REGARDING PRIOR APPEALS OR RELATED CASES

A related case was decided in this case in Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819 (10th Cir. 2000). Appellants are not aware of any other prior appeals or related cases.

Respectfully submitted December 21, 2004.

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STATEMENT OF JURISDICTION

The Southern Utah Wilderness Alliance, The Wilderness Society, and the Grand Canyon Trust (collectively referred to as "SUWA") appeal from an order of the United States District Court for the District of Utah, Central Division, filed October 29, 2004, denying their motions to intervene. Appellants' Appendix ("App.") 0165-67; *see also* App. 0170-203 (Motion Hearing Transcript).

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1346(f) (quiet title). The claims in this action present a case or controversy arising under the Quiet Title Act, 28 U.S.C. § 2409a ("QTA").

Pursuant to Fed. R. App. P. 4(a)(1)(B), SUWA filed a timely notice of appeal on November 1, 2004. This Court, therefore, has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. 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 ("UAC")*, 225 F.3d 1246, 1249 n.1 (10th Cir. 2001).

STATEMENT OF ISSUES

1. The district court erred in denying SUWA's motions to intervene as a matter of right in a case in which county officials claim a highway right-of-way and the right to use motorized vehicles in Salt Creek Canyon, located within a national park, and where SUWA's longstanding, successful efforts to protect the

Canyon's natural and archaeological resources from vehicle use amount to "an interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2). The district court also erred when it said that SUWA's interests were adequately represented by the federal defendants.

2. The district court abused its discretion in denying SUWA's motions for permissive intervention under the circumstances described above because SUWA's defense of the right-of-way claim has a common question of law or fact, and because there was no evidence that "intervention will unduly delay or prejudice" the other parties. *See* Fed. R. Civ. P. 24(b).

STATEMENT OF THE CASE

This appeal is about whether conservation groups who have spent years in a successful effort to protect Salt Creek Canyon in Canyonlands National Park from damage due to motorized vehicles may intervene in a case in which county officials assert a highway right-of-way in the Canyon and its associated creek, a property right that the County argues is largely immune from the National Park Service's efforts to protect the Canyon from vehicle damage.

On June 14, 2004, San Juan County filed suit against the National Park Service (the "Park Service" or "NPS") under the Quiet Title Act to secure a highway right-of-way which lies largely in the bed of Salt Creek. *See* San Juan County Amended Complaint, at 9-10, App. 0016-17. The County also seeks

declaratory relief requiring the National Park Service to allow motorized vehicles to use the alleged right-of-way. *See id*. at 10, App. 0017.[1]

On July 7, 2004, appellant Southern Utah Wilderness Alliance moved to intervene as a defendant to oppose the recognition of a right-of-way in Salt Creek Canyon. Appellants The Wilderness Society and the Grand Canyon Trust filed a similar motion to intervene as defendants on August 4, 2004. The SUWA groups argued that they satisfied the terms of Federal Rule of Civil Procedure 24(a)(2) because, *inter alia*, they had an interest relating to property that is the subject matter of the action, and no other party in the case adequately represented those interests.

San Juan County and the United States opposed the motions to intervene largely on the grounds that without an ownership interest in Salt Creek, SUWA should not be allowed to intervene as of right or permissively. By order dated October 29, 2004, the district court denied the motions to intervene. *See* App. 0165-67. On December 13, 2004, the district court denied SUWA's motion to stay the proceedings pending appeal, and approved a scheduling order by which

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[1] The County bases its Quiet Title Act claim on R.S. 2477, codified at 43 U.S.C. § 932 (1866) ("the right-of way for the construction of highways across public lands, not reserved for public uses, is hereby granted"). *See generally*, San Juan County Amended Complaint, at 3-10, App. 0010-17. R.S. 2477 was repealed in 1976 by the Federal Land Policy and Management Act ("FLPMA"), subject to valid existing rights. *See* FLPMA, Pub.L. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976) (repealing R.S. 2477); 43 U.S.C. § 1769 (rights-of-way in existence on date of R.S. 2477's repeal remain valid).

discovery will commence in early 2005, and a final pre-trial conference will take place on December 16, 2005. *See* App. 0006 (Docket Entries 51 and 52).

Southern Utah Wilderness Alliance, The Wilderness Society and the Grand Canyon Trust jointly filed their notice of appeal on November 1, 2004, and will shortly be requesting that the Court grant a stay pending appeal, or alternatively expedite consideration of the appeal given that the district court is moving forward expeditiously with the underlying case.

This case is just the latest chapter in a long history of ongoing litigation, administrative proceedings and public advocacy involving Salt Creek Canyon in which the Southern Utah Wilderness Alliance, the Park Service and San Juan County[2] have been involved. *See S. Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205, 1207-12 (D. Utah 1998), *rev'd and remanded*, 222 F.3d 819 (10th

[2] San Juan County and the State of Utah were defendants from 2001-2003 in the district court proceedings that followed after this Court's remand in *Dabney*. The County and the State were dismissed from that action in January 2003 after they informed the district court that, having unsuccessfully sought summary judgment on their R.S. 2477 claim, they would not file an action under the Quiet Title Act. *See S. Utah Wilderness Alliance v. Nat'l Park Serv.*, 2:95CV559 (DAK) (D. Utah), Order of the Court (Jan. 16, 2003), Appellants' Addendum ("Add.") 0001-10. That litigation continues today, and the Southern Utah Wilderness Alliance and Park Service are currently cross-claim co-defendants defending a challenge brought by off-road vehicle groups against the Park Service's Final Rule closing Salt Creek to motor vehicles. *See S. Utah Wilderness Alliance v. Nat'l Park Serv.*, 2:95CV559 (DAK) (D. Utah) (Docket) Docket Nos. 250-62, Add. 38.

Cir. 2000).[3] That litigation was intertwined with years of administrative proceedings and environmental study which culminated in the Park Service's decision to protect Salt Creek Canyon from vehicle use, a decision SUWA long sought and supports. *See* Canyonlands National Park – Salt Creek Canyon, Final Rule, 69 Fed. Reg. 32,871, 32,871-72 (June 14, 2004), Appellants' Addendum (referred to hereafter as "Add.") 0040-45.

Through the litigation and advocacy work of all three of the SUWA groups, Salt Creek Canyon has been continuously closed to vehicles either by court order or by order of the Park Service since 1998, and the health of Salt Creek's natural environment has largely been restored. *Id.* at 32,872, Add. 0041.

STATEMENT OF FACTS

As detailed below, Salt Creek Canyon is an unusually important feature of Canyonlands National Park. Because of its beauty and uncommonly lush environment, SUWA members regularly visit Canyonlands National Park and Salt Creek Canyon for conservation, aesthetic, scientific and recreational purposes. *See* Declaration of Wayne Hoskisson ("Hoskisson Dec.") ¶¶ 3, 5, App. 0047-50; Declaration of Laura Kamala ("Kamala Dec.") ¶¶ 3, 4, App. 0075-79. Its unique contribution to the Park's natural environment, and the damage it sustained as a

[3] On appeal, this Court recognized that vehicle use had caused damage in Salt Creek, but remanded for further proceedings under a different standard of review. *See Dabney*, 222 F.3d at 822, 830.

result of four-wheel drive vehicles, motivated SUWA undertake a successful, decade-long effort in various forums to protect the Canyon. San Juan County's attempt in this case to obtain a highway right-of-way and to secure vehicle access in the Canyon would, if successful, undermine the Park Service's authority to protect this fragile environment from vehicle damage, and reverse the protection that SUWA has helped achieve.

I. SALT CREEK CANYON IS AN IMPORTANT NATURAL RESOURCE WHOSE "CONSERVATION IS KEY TO THE NATURAL INTEGRITY OF THE PARK."

Canyonlands National Park, created by Congress in 1964 to protect its "superlative scenic, scientific, and archeological features," comprises one of the largest expanses of rough, scenic, redrock country in the southwestern United States, and its stunning scenery draws thousands of visitors every year. 16 U.S.C. § 271.

The ecological and archaeological importance of Salt Creek and its contribution to the natural environment of the Park is well documented. In its recent environmental assessment of the impacts of vehicle use in Salt Creek, the Park Service emphasized Salt Creek's importance to the integrity of Canyonlands National Park as a whole:

> Salt Creek supports the most extensive riparian area in Canyonlands National Park, other than the Green and Colorado Rivers. Surface water and riparian habitat are among the rarest habitat types in the arid

> Canyonlands environment, and are particularly important to wildlife. Salt Creek supports the richest assemblage of birds and other vertebrate wildlife in the park, outside the [Green and Colorado] river corridors []. For these reasons, the Salt Creek riparian/wetland ecosystem is a resource whose conservation is key to the natural integrity of the park.

National Park Service, Canyonlands National Park, Environmental Assessment, Middle Salt Creek Canyon Access Plan ("Salt Creek EA" or "the EA"), June 2002, at 94, Add. 0140 (available at http://www.nps.gov/cany/pdfs/saltcreekEA.pdf) (emphasis added).[4] Other than the much-larger Colorado and Green Rivers, Salt Creek is the *only* perennial stream in the Park. *See Dabney*, 222 F.3d at 822. Further, Salt Creek is a key part of the larger environment beyond Canyonlands National Park. "The connection of Salt Creek drainage with the Abajo Mountains provides an important corridor for movement of large mammals [including black bear and mule deer] between the two ecosystems." Salt Creek EA at 29, Add. 0075.

Salt Creek and the canyon through which if flows have also provided a haven for prehistoric cultures which left unique artifacts, thousands of years old.

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[4] SUWA requests that the Court take judicial notice of the Salt Creek EA and the other government reports and publications included in SUWA's Addendum. *See Pueblo of Sandia v. United States*, 50 F.3d 856, 861 n.6 (10th Cir. 1995); *Clappier v. Flynn*, 605 F.2d 519, 535 (10th Cir. 1979) (judicial notice of official government publications); *see also Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of material on government website and citing supporting caselaw). Judicial notice may be taken at any stage of the proceeding, including on appeal. *See* Fed. R. Evid. 201(f); *United States v. Burch*, 169 F.3d 666, 671(10th Cir. 1999).

Indeed, it has "the highest recorded density of archaeological sites in [Canyonlands National Park]." Salt Creek EA at 7, Add. 0053 (emphasis added). In 2001, the NPS located six archeological sites in Salt Creek Canyon, along the County's purported right-of-way. The Park Service recommended all six sites for nomination to the National Register of Historic Places. *See id.* at 31-32, Add. 0077-78.

To a significant extent, Salt Creek itself is the route San Juan County claims to be a "constructed highway."

> In the 8.2 miles between Horse Canyon and Angel Arch Canyon, the four-wheel drive road weaves in and out of the streambed and crosses the channel about 60 times, in places remaining in the streambed for considerable distances. There are no man-made structures (culverts, bridges etc.) along the road.

Id. at 7, Add. 0053. *See also* 69 Fed. Reg. at 32,871, Add. 0041 ("The Salt Creek 'road' is an unpaved and ungraded jeep trail that runs in and out of Salt Creek and, at various locations, the trail's path is in the creek bed."). The Canyon is so narrow and rugged that, as this Court has explained, "[t]here is no practical way to reroute the road to avoid the water course." *Dabney*, 222 F.3d at 822 (emphasis added).

II. SUWA'S DECADE-LONG EFFORT TO PROTECT SALT CREEK CANYON FROM THE DAMAGE OF MOTORIZED VEHICLE USE.

SUWA's history of involvement in this controversy began in 1992, when the Park Service began preparing a Backcountry Management Plan for Canyonlands

National Park to address, among other things, increased visitor impact on Park resources and its related effect on the quality of visitor experience. *Dabney*, 222 F.3d at 822-23. *See also* National Park Service, Canyonlands National Park and Orange Cliffs Unit of Glen Canyon National Recreation Area, Backcountry Management Plan ("BMP") (Jan. 1995) (available at http://www.nps.gov/cany/pdfs/backplan.pdf), Add. 0220-273. Among these impacts was damage to Salt Creek from jeep use. As this Court explained:

> [T]here were several instances every year of vehicles losing transmission, engine, or crankcase fluids in the water. The NPS became concerned with the adverse impacts inherent in the existence of a road and vehicle traffic in this narrow riparian corridor.

Dabney, 222 F.3d at 822-23.

In response to the release of the draft BMP in December 1993, the Southern Utah Wilderness Alliance strenuously advocated in written comments and personal communication with Park Service personnel for the protection of the Canyon's fragile riparian habitat and the archeological resources that vehicle traffic was destroying. However, while the final BMP, released in 1995, admitted that vehicle use was causing damage to the Creek and other values of the Park, the NPS did not close Salt Creek to motorized vehicles. *See* BMP at 33-34, 47-48, Add. 0252-53, 0266-67 (studies commissioned by NPS "indicate that the presence of the [Salt Creek] road has resulted in decreased bird, small mammal, aquatic invertebrate and vascular plant populations when compared to the immediately adjacent area

without the road…. [A]dditional study has documented that the road has negatively impacted aquatic invertebrate populations ….”). Instead, the agency adopted a permit system that allowed daily vehicle use. *Dabney*, 222 F.3d at 823.

As a result, the Southern Utah Wilderness Alliance filed suit challenging the NPS’s decision to leave Salt Creek open to motorized vehicles, alleging, among other things, that the Park Service had a duty to close the route to prevent impairment of Park resources under the National Park Service Organic Act. *See Dabney*, 7 F. Supp. 2d at 1210-11. Following three years of litigation, the district court ruled in 1998 in the group’s favor, and enjoined the use of motor vehicles in Salt Creek Canyon. *See id.* at 1210-12. The district court agreed that the Park Service had ample evidence that the use of motor vehicles in Salt Creek Canyon was destroying critical park resources.

> The administrative record shows both that the riparian areas in Salt Creek Canyon are unique and that the effects of vehicular traffic beyond Peekaboo Spring are inherently and fundamentally inimical to their continued existence. The presence of the jeep trails eliminates areas that would otherwise support rare riparian vegetation and provide a rare habitat for a diverse array of small mammals and birds. Driving vehicles through the water kills aquatic species by increasing turbidity, churning pool bottoms, breaking down banks, and decreasing fish habitat.

Id. at 1211.

Off-road vehicle groups appealed the decision, which the Southern Utah Wilderness Alliance defended. *See generally, Dabney*, 222 F.3d 819. While this

Court subsequently reversed and remanded the district court's decision, it did so because the district court had applied an improper standard to SUWA's National Park Service Organic Act claim, not because leaving the Canyon open to vehicle use protected the Canyon and Salt Creek. *See id.* at 822-30.

In the wake of this Court's decision, all three of the SUWA groups began an intensive effort to participate in, and educate the public about, a renewed effort by the Park Service to study the effect of vehicle use in Salt Creek and to protect the area from the resulting damage from such use. *See* Hoskisson Dec. ¶ 5, App. 0049-50; Kamala Dec. ¶¶ 3-4, App. 0078-79. During its study, the Park Service closed Salt Creek Canyon to motor vehicle use to protect agency's ability to consider a full range of alternatives in its upcoming environmental assessment. *See* National Park Service, Notice to the Public, Temporary Prohibition of Motorized Vehicles (October 23, 2000), Add. 0274-75; National Park Service, Notice to the Public, Temporary Prohibition of Motorized Vehicles (Oct. 10, 2002) (extending closure put in place by October 2000 NPS Order), Add. 0276-77.

In June 2002, the Park Service released the Salt Creek environmental assessment which evaluated four alternative management options for Salt Creek, three of which permitted vehicle use at various levels, and a fourth that kept the closure in place. *See* Salt Creek EA at 18-23, Add. 0064-69. During the EA comment period, the Southern Utah Wilderness Alliance and its members again

submitted comments advocating the closure of Salt Creek to motor vehicles. Hoskisson Dec. ¶ 4, App. 0048-49. Ultimately, the vast majority of the 7,000 public comments received by NPS supported the closure alternative. *See* 69 Fed. Reg. at 32,873, Add. 0042.

The Salt Creek EA catalogued the degradation caused by motor vehicle use, concluding that there was no way to mitigate the damage such use caused to Salt Creek Canyon's critical riparian ecosystem. *See* Salt Creek EA at 92, 97, 100, Add. 0138, 0143, 0146 (alternatives that "would not remove traffic from the streambed and riparian area" – that is, any alternative involving even limited motor vehicle use of Salt Creek Canyon – "would not fully mitigate" damaging impacts to riparian/wetland values). Evidence of ecological recovery in the Canyon's riparian area that occurred after motor vehicles were prohibited confirmed the Park Service's conclusions, *id.* at 137-40, Add. 0189-92, and the Park Service itself concluded that the recovery of this critical ecosystem would be negated by a resumption of vehicle use. *See id.* at 84-102, Add. 0130-48. As a result, the Park Service stated that it could not implement any alternative permitting vehicle use in Salt Creek because to do so would violate the NPS Organic Act, the very same position the Southern Utah Wilderness Alliance had pressed since 1995. *See* 69 Fed. Reg. at 32,872, Add. 0041.

Together with the EA, the Park Service also prepared a "Preliminary Assessment" of San Juan County's right-of-way claim which concluded that the County had not met the statutory prerequisites for such a claim. *See* Salt Creek EA at 152-166 (available at http://www.nps.gov/cany/pdfs/scEAapdx4.pdf), Add. 0204-19.[5] *Id.* The NPS has never finalized its R.S. 2477 assessment.

Consistent with its findings, the NPS issued a final decision in September 2002 prohibiting motorized vehicles in Salt Creek. *See* National Park Service, Finding of No Significant Impact, Middle Salt Creek Canyon Access Plan, Canyonlands National Park (Sept. 26, 2002) (available at http://www.nps.gov/cany/pdfs/scFONSI.pdf) Add. 0278-84; *see also* 69 Fed. Reg. at 32,872, Add. 0041.[6] To implement its closure decision, the Park Service also proposed amendments to its travel regulations for Canyonlands National Park. *See* Special Regulations, Areas of the National Park System, Proposed Rule, 68 Fed. Reg. 47,524-27 (Aug. 11, 2003). The SUWA groups submitted comments on the NPS's proposed rule, again advocating the closure of Salt Creek to motor vehicles,

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[5] *See* 69 Fed. Reg. at 32,872, Add. 0041 ("The NPS has sought and examined information relevant to the claim that this route is an R.S. 2477 right-of-way. Based on this review, the NPS concluded that it has not been shown that a valid right-of-way was constructed during the period when the lands were unreserved.").

[6] Despite the closure order, San Juan County officials drove County vehicles into Salt Creek on at least two occasions, including a trip in May 2001. *See* Errata to Salt Creek EA, Add. 0287 ("damage to vegetation" from an "unauthorized" trip in May 2001 by San Juan County "could be seen after only four vehicle passes.")

and urged their members to do the same. *See* Hoskisson Dec. ¶ 3, App. 0048; Declaration of Leslie Jones ("Jones Dec.") ¶5, App. 0080-82. More than ninety-seven percent of the 2,000 comments submitted to NPS supported the rule, which was finalized on June 14, 2000. *See* 69 Fed. Reg. at 32,873, Add. 0042.

To summarize, the SUWA groups have been full participants in the processes which eventually led to the protection of Salt Creek Canyon: the Southern Utah Wilderness Alliance has been involved in public advocacy and in litigation on this issue since 1993; all the groups have publicly and repeatedly urged the Park Service to protect Salt Creek Canyon as the agency proceeded through the various administrative steps towards eventual closure of the Canyon to vehicles; the groups have conducted public and member education on the importance of protecting Salt Creek Canyon from vehicles; and, the groups have provided comments and information to the Park Service in its administrative review of the County's R.S. 2477 claim in Salt Creek Canyon.[7]

The very day the Park Service issued its final regulation protecting Salt Creek Canyon from motor vehicles – June 14, 2004 – San Juan County filed the

[7] Southern Utah Wilderness Alliance is widely acknowledged in the media as playing an important role in encouraging the NPS to restrict vehicles on Salt Creek and to protect NPS resources from motorized vehicle damage. *See*, *e.g.*, Donna Kemp Spangler, San Juan Wants Road in Salt Creek Opened, DESERET MORNING NEWS, June 18, 2004, at B8, App. 0052.

instant litigation, claiming that it held a property right in the Creek which was immune from the Park Service's protective mandate.

SUMMARY OF THE ARGUMENT

The district court erred in denying SUWA's motion to intervene as a matter of right where San Juan County's success in obtaining a highway right-of-way in Salt Creek would imperil the protection of a critical component of the Park's conservation - protection which SUWA spent a decade of significant effort to achieve. The test for intervention as of right in this circuit is described in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior* ("*Coalition of Counties*"), 100 F.3d 837, 840 (10th Cir. 1996), which held that a party may intervene when:

> (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 "impair[ed] or impede[d];" and (4) "the applicant's interest is not adequately represented by existing parties."

Id. (quoting Fed. R. Civ. P. 24(a)(2)) (alterations in original).

First, in this case, no party disputes that SUWA's motions, which were filed before the federal defendants filed their answer, were timely. *See* App. 0001-5. (district court docket entries) (motions to intervene filed in July and August 2004; federal defendants answer to amended complaint filed in October 2004).

Second, SUWA's interest in Salt Creek Canyon satisfies the requirement that SUWA have an interest relating to the property which is the subject of the suit. In this respect, this case is controlled by *UAC*, where this Court held that "[t]he interest of the intervenor is not measured by the particular issue before the court but is instead measured by whether the interest the intervenor claims is related to the property that is the subject of the action." 255 F.3d at 1252 (emphasis in original and added). Like the conservation groups in *UAC* (who sought to intervene in a case in which plaintiffs challenged the creation of a national monument which the groups supported), here SUWA seeks to intervene in a case in which the plaintiffs seek to reverse land protection which SUWA successfully championed through years of effort.

Third, SUWA's interest in Salt Creek Canyon and its protection in the face of San Juan County's claimed property right, "may as a practical matter be impaired or impeded" as a result of this case. The County's successful pursuit of a right-of-way through the Creek and its requested relief of opening the Canyon to motor vehicle use would undo the Canyon's current protected status – a status long sought by SUWA.

Fourth, no other party adequately represents SUWA's interests in this matter. *See* Motion Hearing Transcript ("Transcript") at 15-22, 28-30, App. 0184-91, 0197-99. SUWA's burden to establish the potential for inadequate

representation is "minimal." *See UAC*, 255 F.3d at 1254. SUWA meets this burden because its interest in protecting Salt Creek from motorized vehicles diverges from, and is more focused than, the federal defendants' broader interest in representing the interests of all citizens. *See id*. at 1254-55; *Utahns for Better Transp. v. United States Dep't of Transp*., 295 F.3d 1111, 1117 (10th Cir. 2002). Moreover, the federal defendants have already demonstrated that their interests diverge from that of SUWA: the NPS actively resisted protecting Salt Creek until 1998, well after SUWA initiated legal action to compel the agency to protect Park resources from motorized damage; the NPS failed to finalize its administrative preliminary finding that the County's R.S. 2477 claim was not valid; and between 2000-01, the NPS allowed the County to drive in Salt Creek Canyon on at least two occasions, in violation of the NPS's own closure orders.

Even had the district court not erred as a matter of law in denying SUWA's motions to intervene as of right under Rule 24(a)(2), the district court abused its discretion in not granting SUWA permissive intervention pursuant to Fed. R. Civ. P. 24(b) because, *inter alia*, SUWA's defense and its arguments in this case would share a common question of law or fact concerning Salt Creek Canyon and San Juan County's R.S. 2477 claim, and there was no evidence that intervention would cause undue delay or prejudice.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* a district court's rulings on the latter three requirements of Fed. R. Civ. P. 24(a)(2) (interest, impairment and adequate representation). *See Coalition of Counties*, 100 F.3d at 840 (citing *Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 89-90 (10th Cir. 1993)). When the court makes no findings regarding timeliness the Court reviews this factor *de novo*. *See UAC*, 225 F.3d at 1249. When the parties agree that the proposed intervenor's application was timely, this Court need not address that factor. *See Coalition of Counties*, 100 F.3d at 840.

This Court reviews a district court's decision to deny a motion for permissive intervention for abuse of discretion. *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996).

II. SUWA MEETS THE STANDARDS FOR INTERVENTION AS OF RIGHT UNDER FED. R. CIV. P. 24(a)(2).

This Court has consistently held that conservation organizations like SUWA meet the standard for intervention under circumstances such as these where they have a demonstrated interest in the protection and conservation of the property at issue, as well as a history of involvement in the protection of the area. The district court's ruling ignored controlling law set forth in *UAC* and *Coalition of Counties*,

both of which held that conservation groups and individuals had the right to intervene in litigation to defend analogous initiatives of federal agencies.[8]

In *Coalition of Counties*, the Court held that a party is entitled to intervene when:

> (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 "impair[ed] or impede[d];" and (4) "the applicant's interest is not adequately represented by existing parties."

100 F.3d at 840 (quoting Fed. R. Civ. P. 24(a)(2)) (alterations in original). These requirements should be viewed in the context of this Court's "somewhat liberal line in allowing intervention." *Nat'l Farm Lines v. ICC*, 564 F.2d 381, 384 (10th Cir. 1977).

A. SUWA's Interest in Preserving Salt Creek Canyon and in Defending its Protected Status Supports Intervention as of Right.

As was the case with the intervenors in *UAC* – the controlling case on this issue – SUWA's interest in Salt Creek Canyon and its continuing protection qualifies as "an interest relating to the property . . . which is the subject of the action." *UAC*, 255 F.3d at 1249 (quoting Fed. R. Civ. P. 24(a)(2)). In *UAC*, the

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[8] The district court's offer to consider amicus status for SUWA, *see* Transcript at 30, App. 0199, would plainly not address the harm that would befall SUWA if intervention is not granted, since amici typically cannot take discovery, file pre-trail motions, or cross-examine witnesses or present evidence at trial. *See Utahns for Better Transp.*, 295 F.3d at 1115 ("'the right to file a brief as *amicus curiae* is no substitute for the right to intervene as a party in the action under Rule 24(a)(2)'" (quoting *Coalition of Counties*, 100 F.3d at 844)).

proposed-intervenors were conservation groups and others seeking to defend the creation of a national monument which protected public lands in Utah. There,

> [t]he property that is the subject of plaintiffs' lawsuit is the [Grand Staircase-Escalante National M]onument itself. The intervenors claim they have an interest in the continued existence of the monument and its reservation from public entry … on the basis of their desire to further their environmental and conservationist goals by preserving the undeveloped nature of the lands encompassed by the monument. They point out that they were "vocal and outspoken champions and advocates" for the creation of the monument, they have regularly commented on and participated in the government's monument land management plan, and they regularly visit the monument for aesthetic, scientific and recreational purposes.

Id. at 1251.

According to the Court, it was "beyond dispute that the subject of the action is the monument" and that the conservation groups' interests "relating to the monument and its continued existence by virtue of their support of its creation, their goal of vindicating their conservationist vision through its preservation, [and] their use of the monument in pursuit of that vision" was more than sufficient to support intervention as of right *Id*. at 1252 (emphasis added). The *UAC* court emphasized that "[t]he interest of the intervenor is not measured by the particular issue before the court but is instead measured by whether the interest the intervenor claims is related to the property that is the subject of the action." *Id*. (emphasis in original).

The *UAC* court explicitly rejected the district court's approach that focused on the specific *legal* issue raised by the plaintiffs – whether the president exceeded his authority under the Antiquities Act when he created the monument – and held that the proper focus is on the "property" at stake in the case and the intervenors' conservation interests in that property. *Id.* Since the property at stake in that case was the monument, and conservationists had an interest in the monument's protection, they merited intervention. *Id*. (citing *Coalition of Counties*, 100 F.3d at 842-43); *see also id*. (finding "persuasive those opinions holding that organizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens those goals") (citations omitted); *see also Coalition of Counties*, 100 F.3d at 841-44 (holding that an individual's involvement with a species through his activities as a photographer, amateur biologist, naturalist, and conservation advocate amounted to sufficient interest for purpose of intervention in litigation concerning the species' listing under the Endangered Species Act); *Mausolf v. Babbitt*, 85 F.3d 1295, 1302-03 (8th Cir. 1996) (conservation group satisfies interest requirement where it "has consistently demonstrated its interest in the Park's well-being . . . and has worked hard . . . to protect that interest"). [9]

[9] The Eighth Circuit's decision in *Mausolf* is another analogous and instructive case. There, a conservation group was found to satisfy the interest test where plaintiff groups sought to remove a protective designation – a U.S. Fish and

Here, as in *UAC*, there can be no doubt about SUWA's strong, longstanding conservation interest in Salt Creek Canyon. SUWA's members regularly visit the property at issue for aesthetic, scientific and recreational purposes. *See supra* at 5-6. SUWA has actively and vocally advocated over the course of many years for prohibiting vehicle access in Salt Creek Canyon and for the protection of the sensitive resources of the Canyon from vehicular damage. *See supra* at 8-14. *See also Dabney*, 222 F.3d at 823-24 (discussing SUWA's legal involvement in Salt Creek Canyon road issues); 69 Fed. Reg. at 32,871-72, Add. 0041 (discussing history of SUWA involvement in Salt Creek litigation); Hoskisson Dec. ¶¶ 3-5, App. 0048-49; Kamala Dec. ¶¶ 3-4, App. 0077-78; Jones Dec. ¶ 5, App. 0081. Further, SUWA is widely acknowledged in the Utah media as playing an important role in encouraging the NPS to restrict vehicles on Salt Creek and to protect NPS resources from motorized vehicle damage. *See supra* note 7. These are exactly the kinds of interests that this Court has identified as sufficient under Rule 24(a)(2) to merit intervention.

As the plaintiffs attempted – unsuccessfully – to do in *UAC*, San Juan County and the federal defendants improperly sought to exclude SUWA by characterizing the lawsuit as one in which a relatively specific question of law is at issue – the validity of their right-of-way claim in Salt Creek Canyon. Nonetheless,

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Wildlife Service rule that prohibited snowmobiles in part of a National Park. *See* 85 F.3d at 1301-02.

as explained by the Court in *UAC*, because the "interest the intervenor claims is related to the property that is the subject of the action," – in this case Salt Creek Canyon – and because SUWA has a demonstrated, long-standing and deeply-held interest in Salt Creek Canyon, the specific nature of the legal claim is simply not a deciding factor for the purpose of determining whether SUWA has an "interest" sufficient to satisfy this prong of the intervention test.

The reasoning in *UAC* and similar cases is undiminished by the fact that the County in this case seeks a property interest in Salt Creek Canyon. In fact, intervention by conservation groups in cases where plaintiffs seek rights-of-way across public lands is not uncommon. *See, e.g., Southwest Four Wheel Drive Ass'n v. BLM,* 363 F.3d 1069 (10th Cir. 2004) (noting presence of intervenors in Quiet Title Act litigation involving status of routes under R.S. 2477); *United States v. Carpenter*, 298 F.3d 1122 (9th Cir. 2002) (order granting The Wilderness Society's motion to intervene as of right in a case involving Quiet Title Act claims concerning the status of a road on U.S. Forest Service land under R.S. 2477); *Park County v. United States,* 626 F.2d 718, 719 (9th Cir. 1980) (noting that "a local citizen organization[] was allowed to intervene as a party defendant" in a Quiet Title Act claim brought pursuant to R.S. 2477); *City & County of Denver v. Bergland*, 517 F. Supp. 155, 174-75 (D. Colo. 1981), *aff'd in part, rev'd in part*, 695 F.2d 465 (10th Cir. 1982) (granting intervention as of right to conservation

groups and others where county sought right-of-way across Forest Service lands); *Alleman v. United States*, Civ. No. 99-3010- CO (D. Or.), Findings and Recommendations (Nov. 10, 2003) (recommendation in favor of intervention by conservationists in case involving Quiet Title Act claims to alleged right-of-way in wilderness, relying in part on *UAC*), Add. 0288-97, and Order (Feb. 2, 2004) (adopting Findings and Recommendations), Add. 0298-89.

As this Court made clear in *UAC*, if the proposed intervenor has a conservation interest in the public property at the center of the dispute – as SUWA demonstrates here – it easily meets the "interest" prong of the intervention standard, regardless of how a plaintiff has pleaded its legal action to exclude other interested parties. *See* 255 F.3d at 1251-53. The pivotal point is that SUWA has a conservation interest in Salt Creek Canyon, precisely the property at issue in San Juan County's action. Thus, SUWA meets this prong of the intervention test.

B. SUWA's Interests May Be Impaired If San Juan County's Alleged R.S. 2477 Right-of-Way Is Recognized.

Rule 24(a)(2) requires that an applicant for intervention as a matter of right be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." Given the Rule's focus on the possible effect of the action, this Court had held that "impairment need not be 'of a strictly legal nature:'"

> "[We] may consider any significant legal effect in the applicant's interest and [we are] not restricted to a rigid res judicata test." Thus, the *stare decisis* effect of the district court's judgment is sufficient impairment for intervention under Rule 24(a)(2).

Coalition of Counties, 100 F.3d at 844 (quoting *NRDC v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978)) (internal citations omitted). More recently, this Court explained that "[t]o satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *UAC*, 255 F.3d at 1253 (emphasis added) (citation and quotation omitted).

In this case, San Juan County's stated purpose is to re-open Salt Creek Canyon to the very kind of motorized use that damaged the integrity and health of its natural environment – in other words, to reverse the protection that SUWA successfully won after years of advocacy, public education and litigation.[10] There can be no genuine doubt that SUWA's interests in the preservation and protection of Salt Creek Canyon may be significantly impaired by a decision granting a right-of-way to San Juan County over Salt Creek. *See, e.g.*, Hoskisson Dec. ¶¶ 3-5, App. 0048-50. As the United States candidly admitted below, if San Juan County were

[10] San Juan County's amended complaint seeks, among other things, an order directing the NPS to remove the gate blocking vehicle access to Salt Creek Canyon and requiring that the Park Service allow motorized vehicle use. San Juan County Amended Complaint, at 10, App. 0017.

to be successful in this case, then "[t]he full range of management options in Salt Creek Canyon, including a prohibition on motor vehicle traffic may not be available to the [National Park Service] if this Court determines that the County has an R.S. 2477 right-of-way." *See* United States' Memorandum in Opposition to Intervention Motions Filed By SUWA ("U.S. Opp.") at 12 n.7 (emphasis added), App. 0100; *see also* 69 Fed. Reg. at 32,875, Add. 0044 ("should it be subsequently determined that the State [of Utah] and [San Juan] County do hold a valid R.S. 2477 right-of-way, the regulation [closing Salt Creek to motorized vehicles] will be revisited to ensure that it is consistent with the property rights that are afforded to the holders of such valid rights-of-way.").[11]

The return of motorized vehicle use to the canyon, as sought by the County, would indisputably damage the fragile natural resources of Salt Creek Canyon, *see supra* at 11-13, thus harming the interests of SUWA's members who visit this canyon to appreciate, among other things, the "health, recreational, scientific, spiritual, educational, aesthetic, [and] informational" values found therein. *See*

[11] The Park Service would retain some management authority even if San Juan County were able to establish a valid R.S. 2477 highway right-of-way in Salt Creek. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068, 1088, 1090-91 (10th Cir. 1988), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992); *United States v. Vogler,* 859 F.3d 638, 642 (9th Cir. 1988) (holding that Department of Interior has some authority to regulate use of R.S. 2477 right-of-way). The Park Service may not, however, be able to deny all access to Salt Creek if the district court finds that a valid right-of-way had been established.

Hoskisson Dec. ¶ 3, App. 0048 (SUWA members and staff enjoy the protections that the NPS closure order affords, including reduced damage to cryptobiotic soils, cultural resources, and sensitive streamside vegetation); Kamala Dec. ¶¶ 3-4, 6, App. 0077-79. Indeed, the NPS itself has acknowledged that vehicle use in Salt Creek Canyon has been "found to cause impairment to park resources and values because of adverse effects to the Salt Creek riparian/wetland ecosystem." *Id*. at 32,872, Add. 0041.

Moreover, SUWA's interests will be directly impaired by the relief sought by San Juan County – the granting of an R.S. 2477 right-of-way in Salt Creek Canyon and the resumption of motorized vehicle-caused damage to the Canyon's natural and cultural resources. *See UAC*, 255 F.3d at 1253-54 & n.5 (where relief sought by plaintiffs could undermine or eliminate off-road restrictions on fragile Utah public lands, interests of proposed intervenor conservationists supporting vehicle limits to protect the area may be impaired for purposes of Rule 24); *Utahns for Better Transp.*, 295 F.3d at 1116 (looking to relief sought by plaintiffs in their complaint to measure impairment to proposed intervenors). Further, such a decision would limit SUWA's ability to defend the Park Service's closure order in ongoing litigation in a related case in the District of Utah. *See supra* note 2 (explaining that SUWA and Park Service are cross-claim co-defendants in a challenge to the NPS's Final Rule); *see also Mausolf*, 85 F.3d at 1302-03 (holding

that future preclusive effect of a decision on the merits of the action was adequate "impairment" under Rule 24(a)(2)).[12]

Finally, the potential for settlement of the case constitutes potential impairment under Rule 24(a)(2). *See Mausolf*, 85 F.3d at 1302-03. Indeed, either possibility would clearly and adversely impair SUWA's interests in the protection of Salt Creek Canyon from motorized vehicles.

C. SUWA's Interests Will Not Be Adequately Represented by the Federal Defendants.

The final prong of the intervention as-of-right test "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." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (quotation omitted) (emphasis added). In this circuit, the leading cases hold that this requirement was met where: 1) it was "impossible" to expect the federal government to represent adequately the focused interests of conservationists; or 2) where there is a history of adversarial proceedings between the government and conservationists over the preservation of

[12] In addition, there are at least 5,000 "pending" R.S. 2477 claims on Bureau of Land Management Lands in Utah which may also implicate public lands conservation issues. *See* United States Department of the Interior, Report to Congress on R.S. 2477, at 29 (June 1993) (excerpts), Add. 0300-06. A ruling on the merits in this case will likely create just the type of *stare decisis* effect identified in *UAC* as warranting intervention. *Supra* at 24-27.

the property at issue in the case. *See UAC*, 255 F.3d at 1254-56; *Coalition of Counties*, 100 F.3d at 844-46. Both circumstances are present in this case.

1. The Federal Defendants Do Not Represent the Focused Conservation Interests of SUWA.

In *Coalition of Counties*, this Court expressed significant skepticism generally about the ability of federal defendants to represent adequately the specific interests of a particular group, and held that is such cases, the "minimal burden" of this aspect of the intervention test is satisfied.

> We have here . . . the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation.

100 F.3d at 845 (quoting *Nat'l Farm Lines*, 564 F.2d at 384) (emphasis added). *See also Mausolf*, 85 F.3d at 1303-04.[13] Thus, the *Coalition of Counties* court acknowledged that in the case before it, because "[the Department of Interior] must

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[13] In *Mausolf*, public interest groups were permitted to intervene and defend a suit brought by snowmobilers against the Fish and Wildlife Service ("FWS") challenging the closure of National Park trails to protect animal habitat. Concluding that the FWS would not adequately represent the interests of the intervening public interest groups, the *Mausolf* court stated that utilitarian and conservationist purposes "will sometimes, unavoidably, conflict, and even the Government cannot always adequately represent conflicting interests at the same time." 85 F.3d at 1303. *See also Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (holding Forest Service could not represent state and county interests in defending against issuance of timber harvest injunction).

represent the public interest, which may differ from [the intervenors'] particular interest," and because the Interior Department had shown reluctance in the past to protect the Mexican spotted owl, intervention was appropriate. 100 F.3d at 845.

This Court reaffirmed its approach in *UAC*, where it concluded that the federal government did not adequately represent the interests of the proposed intervenors Southern Utah Wilderness Alliance, The Wilderness Society, the Grand Canyon Trust and others, even though both the federal defendants and SUWA had the exact same goal – to uphold the legality of the Grand Staircase-Escalante National Monument. *See* 255 F.3d at 1254-55. Because the government's role in representing a broader public interest – compared to the more focused conservation interest represented by the environmental groups – created the potential for disagreement, the *UAC* court held that the federal defendants did not adequately represent SUWA's interests. *See id.* at 1255 (expressly recognizing that where a federal agency is the defendant, the potential for inadequate representation is great); *see also Utahns for Better Transp.*, 295 F.3d at 1117 ("We have repeatedly pointed out that in such a situation the government's prospective task of protecting not only the interest of the public but also the private interest of the petitioners in intervention is on its face impossible and creates the kind of conflict that satisfies the minimal burden of showing inadequacy of representation.") (emphasis added) (citations and quotations omitted).

The situation before this Court in *Coalition of Counties* and *UAC* is precisely the situation presented here. In this case, SUWA's interest lies in protecting Salt Creek Canyon from the damage and destruction caused by motorized vehicles, whereas the federal defendants represent a more generalized interest. This Court's well-established caselaw demonstrates that this potential divergence in views between SUWA's specific interests and the duty of federal defendants satisfies the minimal burden of demonstrating inadequacy of representation. *See UAC*, 255 F.3d 1254-56; *Coalition of Counties*, 100 F.3d at 845-46.

The potential for inadequate representation is even more pronounced here, because while federal defendants stated to the district court that they will represent SUWA's interests, federal defendants do not even recognize that a conservation interest is implicated in this case. *See* U.S. Opp. at 13-15, App. 0101-03. The government certainly cannot defend an interest whose existence it refuses to even acknowledge. As in other cases in which this Court has held that intervention of right is merited, "the government entities' 'silence on any intent to defend the [intervenors'] special interests is deafening,'" and provides a further basis for finding a divergence between the interests of the United States and SUWA. *Utahns for Better Transp.*, 295 F.3d at 1117 (quoting *UAC*, 255 F.3d at 1256) (alteration in original) (other citations omitted).

2. The History of Adversarial Proceedings Between SUWA and the Park Service Demonstrates that the Federal Defendants May Not Adequately Represent SUWA's Interests.

In *Coalition of Counties*, this Court allowed intervention as of right by Dr. Robin Silver, one of the Mexican spotted owl's most ardent supporters. *See* 100 F.3d at 839-40, 844-45 (describing Dr. Silver's long-history of involvement in advocating protection for the Mexican spotted owl). The Court held that the

> [Department of Interior]'s ability to adequately represent [proposed intervenor] Dr. Silver despite its obligation to represent the public interest is made all the more suspect by its reluctance in protecting the Owl, doing so only after Dr. Silver threatened, and eventually brought, a law suit to force compliance with the [Endangered Species] Act. Under these circumstances, we conclude that Dr. Silver has made the minimal showing necessary to suggest that the government's representation may be inadequate.

Id. at 845-46 (internal citations omitted); *see* 7C Wright, Miller & Kane, Federal Practice and Procedure Civil 2d § 1909 at 320-23 (1986 & Supp. 2004) (cases "in which the party who may, in some senses, represent the absentee also is adverse to the absentee" are "easy to resolve. . . . The absentee cannot be required to look for representation to one who is his opponent and . . . this branch of the rule must be regarded as satisfied."); *see also Mausolf*, 85 F.3d at 1302-03 (relying on history of litigation between environmental group and government to conclude that government would not adequately represent environmental groups' interests).

Here, the Southern Utah Wilderness Alliance battled the Park Service in federal court for five years before the agency agreed to protect Salt Creek from

motorized vehicles. *See Dabney*, 222 F.3d at 819. The federal defendants' long "reluctance" to protect the unique resources of Salt Creek, a reluctance previously overcome only by litigation brought by Southern Utah Wilderness Alliance is strikingly similar to the circumstance described in *Coalition of Counties* where the court held that the intervenor should not be forced to look to its adversary for adequate representation in a case involving the intervenor's conservation interests. *See* 100 F.3d at 845-46.[14]

There are other indications that the federal defendants may not adequately represent SUWA's interests in this case. For example, the Park Service's failure to finalize its preliminary R.S. 2477 determination and the potential that the agency will settle this case in a way adverse to SUWA's interests demonstrates that appellants meets the "minimal burden" set by this prong of the intervention

[14] In addition, on issues concerning sound management of natural resources in National Parks as well as R.S. 2477, Southern Utah Wilderness Alliance and The Wilderness Society have been on opposite sides of litigation from defendants NPS and the Department of the Interior, thus further demonstrating that the agency's interests and those of the SUWA groups are not one and the same. *See* Jones Dec. ¶¶ 6-8, App. 0081-82 (detailing several cases in which The Wilderness Society sued or is suing the NPS or Interior Department). Those cases include: *The Wilderness Society v. Norton*, 03-0064 (D.D.C) (challenge to NPS failure to meet statutory and policy deadlines regarding wilderness reviews, recommendations and wilderness planning); *High Country Citizens Alliance v. Norton*, 03-WY-1712 (D. Colo.) (challenge to settlement between NPS and Colorado water interests re: federal reserved water rights for Black Canyon of the Gunnison NP); *Greater Yellowstone Coalition v. Norton*, 03-0752 (D.D.C.) (challenge to NPS decision to permit snowmobile use within Yellowstone National Park).

analysis. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993) (recognizing that "if the case is disposed of by settlement rather than by litigation, what the [defendant] perceives as being in its interest may diverge substantially from the [intervenors'] interests").[15]

SUWA, therefore, has met its minimal burden of demonstrating that the federal defendants do not and cannot adequately represent SUWA's interests.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN HOLDING THAT SUWA DID NOT WARRANT PERMISSIVE INTERVENTION UNDER FED. R. CIV. P. 24(b).

Permissive intervention should be granted if the applicant can show: (1) there are common questions of law or fact; (2) the intervention will not cause undue delay or prejudice; and, (3) the application to intervene is timely. *See* Fed. R. Civ. P. 24(b); *see also State of Utah v. Kennecott Corp*., 801 F. Supp. 553, 572 (D. Utah 1992) (reviewing factors to be considered for permissive intervention), *appeal dismissed*, 14 F.3d 1489 (10th Cir. 1994). This Court reviews "a denial of

[15] The Interior Department has recently settled high-profile cases, such as this one, against the interests of conservation organizations. *See, e.g., State of Utah v. Norton*, 2:96CV870 (D. Utah) (case dismissed by settlement agreement that purported to do away with Interior Department's authority to inventory and establish new wilderness study areas) (on appeal, *State of Utah, et al. v. Gale Norton, et al.; Southern Utah Wilderness Alliance, et al.*, (Docket No. 03-4147); *United States v. Carpenter*, 298 F.3d at 1124-25 (United States settled case concerning status of contested road under R.S. 2477; Ninth Circuit granted The Wilderness Society's motion to intervene as of right because, in part, United States did not necessarily represent Wilderness Society's interests).

permissive intervention for abuse of discretion." *City of Stilwell*, 79 F.3d at 1042 (citations omitted).

Caselaw is clear that the standard for permissive intervention is substantially lower than the test for intervention of right under Rule 24(a) and that it does not require that the intervenor have a direct interest in the subject of the litigation. *See SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940); 7C Wright, Kane & Miller, Federal Practice and Procedure § 1913 (1986 & Supp. 2004).

SUWA easily meets the first three objective criteria for permissive intervention. First, SUWA intends to assert claims and defenses that are "common with" those that are at the center of this action: whether the circumstances of this case support a finding that the County has a valid right-of-way under R.S. 2477 in Salt Creek Canyon. *See* Proposed Answer, Southern Utah Wilderness Alliance at 5, App. 0057; Proposed Answer, Grand Canyon Trust *et al.* at 6, App. 0088.[16]

Second, SUWA *et al.* raised in their proposed answers a number of defenses concerning whether the County can maintain its action under the QTA. *See id.* The issues SUWA has asserted are directly responsive to San Juan County's claims

[16] That the current action has been brought under the Quiet Title Act does not affect granting of permissive intervention. *See supra* at 34-35; *California ex rel. State Lands Comm'n v. United States*, 805 F.2d 857, 860, 865-66 (9th Cir. 1986) (upholding grant of permissive intervention to conservation groups in QTA case).

against the federal government, and thus the requirement for permissive intervention is clearly met.

Third, SUWA's motion to intervene is timely, and would not unduly delay the adjudication of this case. Fed. R. Civ. P. 24(b). Nor is there any evidence that intervention will prejudice plaintiffs by imposing unrelated additional claims, defenses and discovery. These factors weigh especially heavily in favor of intervention here, where San Juan County has waited at least nine years since the Park Service first imposed a permit system on vehicle use of Salt Creek Canyon to press its claim.

As the district court noted in *Kennecott*, the additional subjective factors to be considered for permissive intervention are very close to those in Rule 24(a)(2), including: adequacy of representation, the extent of intervenor's interests, and the benefit of intervention. *See* 801 F. Supp. at 572. SUWA has demonstrated that it meets or exceeds these factors as well, *see supra* at 18-34, and that its involvement in this case would likely "contribute to a full development of the underlying issues in the suit." *Oregon Envt'l Council v. Oregon Dep't of Envt'l Quality*, 775 F. Supp. 353, 359 (D. Or. 1991).

Thus, the district court abused its discretion in denying SUWA's motion for permissive intervention.

CONCLUSION

For the reasons set forth above, the Southern Utah Wilderness Alliance, The Wilderness Society, and the Grand Canyon Trust respectfully request that this Court enter an order granting them intervention of right in the district court proceedings under Fed. R. Civ. P. 24(a). Alternatively, SUWA requests that it be granted permissive intervention under Fed. R. Civ. P. 24(b).

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because this case presents fundamental issues of broad public importance regarding the ability of public interest groups to intervene in cases in which the assertion of property rights such as R.S. 2477 claims would undermine protection of public lands, SUWA requests oral argument in this case. The *stare decisis* effect, as well as other consequences following the resolution of the district court case, will have far-reaching impact on the management of millions of acres of federal lands in Utah and elsewhere. Oral argument will assist this Court in reaching a full understanding of the case, and allow the attorneys for all parties the opportunity to address any outstanding factual or legal issues which this Court deems relevant.

Respectfully submitted December 21, 2004

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.A.P. 32(a)(7)(C) the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,279 words.

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