No. _____ 08-571

In The

Supreme Court of the United States

ELKO COUNTY, NEVADA,

Petitioners,

v.

THE WILDERNESS SOCIETY; GREAT OLD BROADS FOR WILDERNESS; UNITED STATES OF AMERICA; and JOHN C. CARPENTER, individually and as agent for Citizens United for the South Canyon Road,

Respondents.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a proposed intervenor of right required to have independent Article III and prudential standing to intervene as a defendant aligned with the United States in a quiet title action under 28 U.S.C. § 2409?

2. Is an environmental interest sufficient to confer Article III and prudential standing on a proposed intervenor in a Quiet Title action under 28 U.S.C. § 2409?

3. Is a circuit court of appeals required to decide whether a case in district court is moot as between the original parties before it decides whether a proposed intervenor of right needs Article III and prudential standing to support intervention?

PARTIES TO THE PROCEEDING

Plaintiff-counter-defendant-Appellee below:

UNITED STATES OF AMERICA

Represented by Elizabeth Ann Peterson, Esq., AUSA,
Post Office Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026

Defendants below:

JOHN C. CARPENTER, INDIVIDUALLY AND AS AGENT OF CITIZENS FOR THE SOUTH CANYON ROAD, GRANT GERBER and Q. JOHNSON O.

Represented Pro Se

Defendant-Appellee below:

COUNTY OF ELKO

Represented by Kristin McQueary, Esq.
Elko County District Attorney's Office
1515 7th Street
Elko, NV 89801

Defendants-Intervenors-Appellants below:

THE WILDERNESS SOCIETY and GREAT OLD BROADS FOR WILDERNESS

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(i) *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008);

(ii) September 19, 2006 Order of the Federal District Court;

(iii) June 13, 2003 Order of the Federal District Court;

(iv) *United States v. Carpenter*, 298 F.3d 1122 (9th Cir. 2002);

(v) August 1, 2008 Order;

(vi) September 16, 2008 Mandate of the Ninth Circuit.

STATEMENT OF JURISDICTION

(i) The opinion of the Ninth Circuit Court of Appeals from which review is sought was filed on May 25, 2008.

(ii) Rehearing was denied August 1, 2008. No order granting an extension of time to file a petition for a writ of certiorari exists.

(iii) Mandate of the Ninth Circuit was filed effective September 16. 2008.

(iv) Basis for Federal Jurisdiction. 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. § 1345 (United States as plaintiff).

(v) Statutory provision conferring jurisdiction on the Supreme Court: 28 U.S.C. § 1254.

(vi) Rule 29.4(b) or (c) notifications are not required.

STATUTES INVOLVED

28 U.S.C. § 2409

Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title [28 U.S.C. §§ 1346, 1347, 1491, or 2410], sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954 [1986], as amended (26 U.S.C. §§ 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. § 666). . . .

Federal Rule of Civil Procedure 24. Intervention

(a) Intervention of Right.

(1) On timely motion, the court must permit anyone to intervene who:

(A) is given an unconditional right to intervene by a federal statute; or

(B) 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. . . .

Section 8 of the Act of July 26, 1866, 14 Stat. 253, and later codified at 43 U.S.C. § 932.3

A right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

STATEMENT OF THE CASE

This case involves a dispute over ownership of a road easement for the South Canyon Road located in Elko County, Nevada, in the Humboldt-Toiyabe National Forest and near the boundary of the Jarbidge Wilderness.

In October 1999, the United States filed suit alleging trespass and seeking an injunction against several Elko County individuals involved in reconstructing the road which had washed out in 1995. Pursuant to FRCP 21, the Federal District Court sua

sponte named Elko County as a defendant to the lawsuit and simultaneously referred the case to mediation.

Elko County filed an answer and counterclaim, which alleged Elko County had title to an easement for the South Canyon Road under the auspices of Section 8 of the Act of July 26, 1866, 14 Stat. 253, formerly section 2477 of the Revised Statutes (hereinafter R.S. 2477) of the United States, and requested the District Court quiet title to the easement against the United States.

On March 2, 2001, all parties reached settlement on all issues. On March 30, 2001, the Wilderness Society and the Great Old Broads for Wilderness (hereafter TWS) filed a motion to intervene as a matter of right as a defendant to Elko County's counterclaim. The District Court denied the motion as untimely. TWS appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit, even though the District Court had conducted no analysis of the other intervention criteria under FRCP 24(a)(2) except timeliness, reversed the District Court decision and remanded the case with instructions to the District Court to grant the motion to intervene and conduct further proceedings consistent with its opinion, *United States v. Carpenter*, 298 F.3d 1122, 1125-26 (9th Cir. 2002).

TWS, after remand, modified its intervention motion to include cross-claims against the United States under the Administrative Procedure Act. TWS

alleged that in agreeing not to contest whether Elko County owned an R.S. 2477 easement in the South Canyon, the United States effectively granted an easement without complying with Federal law.

On remand on June 13, 2003, the District Court held that because the Ninth Circuit instructed it to grant the motion to intervene before a complete FRCP 24(a)(2) analysis had been done, it was necessary for the Court to determine if TWS had Article III and Prudential standing. The District Court found that TWS demonstrated constitutional and prudential standing as to the cross-claims but the cross-claims should be dismissed because the Department of Justice's decision to settle the case was not an agency action reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The District Court held that TWS had neither constitutional nor prudential standing to intervene as a defendant against Elko County's counterclaim under the Quiet Title Act and again denied intervention.

In that same order, the District Court stayed the effectiveness of the Settlement Agreement because it was concerned that the United States had granted a right-of-way triggering procedural requirements not met by the agreement. The District Court stayed the agreement pending compliance with procedural requirements.

On April 27, 2005, and May 31, 2005, the United States Forest Service completed an analysis under the National Environmental Policy Act (NEPA)

concerning re-establishment of the road. The Forest Service decided to re-establish a primitive four-wheel drive road in the South Canyon. TWS requested judicial review of that administrative decision in a separate suit. That suit is still pending. *The Wilderness Society; Great Old Broads for Wilderness v. United States Forest Service, et al.*, USDC 3:07-CV-00170.

Beginning April 30, 2006, the United States and Elko County presented evidence to the District Court for a week to resolve the District Court's questions whether 1) the settlement agreement granted a right-of-way that required procedures not provided for in the settlement agreement and 2) whether there was sufficient evidence that Elko County had a colorable claim to an R.S. 2477 easement in South Canyon to justify the United States not contesting it. TWS was present as amicus and participated in post-hearing briefing. On September 19, 2006, the District Court held that the Settlement Agreement was fair, adequate, reasonable and in accord with applicable law and lifted the stay.

TWS appealed to the Ninth Circuit from both the June 13, 2003, District Court order denying intervention in the Quiet Title Act and dismissal of its cross-claims and from the September 19, 2006, final order of the District Court approving the Settlement agreement.

On May 20, 2008, the Ninth Circuit reversed the order denying intervention and remanded the case for

further proceedings, *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008).

ARGUMENT

WHY CERTIORARI SHOULD BE GRANTED

Permitting environmental groups, or anyone else without a claim of ownership to the real property in issue, to intervene as of right as a Defendant aligned with the United States in a quiet title action under 28 U.S.C. § 2409 effectively allows the intervenor, as well as the Courts, to improperly inject themselves into general executive branch discretionary policy decisions.

This Court has repeatedly forbidden the federal courts and parties from litigating general federal policy questions in cases in which the United States is participating. That is typically done by finding that prospective plaintiffs lack either Article III or Prudential standing or by confining the courts to non policy holdings, *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980). Intervention rules, however, lacking any prudential standing concepts and being so broadly interpreted in favor of intervention, result in intervenors not similarly screened. While intervenors must, theoretically, take a lawsuit as they find it, in practice, and the instant case is a good example, interference by the intervenors with discretionary federal policy is at the forefront of the issues before the trial court.

There is no specific, identifiable federal law providing TWS an environment free of motor vehicles outside the boundaries of a wilderness, just as there is no specific identifiable law entitling taxpayers to have Government funds expended in any particular way. Environmental interests exist as a result of, and are protected by, citizen suit provisions of specific environmental statutes, or by the Administrative Procedure Act. Where only title to real property is at stake, as it is in a quiet title action, and not the use to which the land will ultimately be put, the general rule – that a proposed intervenor need only have a significant protectable interest in the subject matter of the law suit, protected by some statute or law, results in intervenors being allowed to challenge or promote general federal policy before the court in quiet title actions. Thus, the federal courts become, as this Court held they should not, general complaint bureaus about that policy. See *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

Allowing an environmental group to intervene as a co-defendant with the government in a NEPA action has been prohibited by the Ninth Circuit, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002). The rationale for that rule is that, because NEPA requires action only by the government, only the government can be liable under NEPA. Allowing intervention on the side of the United States as plaintiff in a condemnation action by the United States, a kind of inverse circumstance from a quiet title action, is objectionable for essentially the same

reason, *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), cert. denied, 476 U.S. 1108 (1986). Allowing intervention by an environmental group as a defendant with the United States in a quiet title action interjects the court and the intervenors into the discretion of the executive in a virtually identical way. There is no required administrative procedure for the Department of Justice to follow in deciding how and to what degree to initiate a quiet title action. Whether and how to defend a quiet title action is wholly within the discretion of the executive branch, 28 U.S.C. §§ 516, 519.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982) this Court held that:

> Assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.

The Circuit Courts of Appeal are divided on whether Article III standing is necessary to support intervention in the district courts in every case, *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986). Most recently, the Tenth Circuit decided in *San Juan County v. United States*, 503 F.3d 1163, 1171 (2007), where environmental groups, without a claim of title, sought intervention as defendants in a quiet title action, that so long as the party on whose side intervention is sought has Article III standing, the

intervenor need not independently establish his own standing.

The Ninth Circuit's position on the necessity of establishing independent Article III standing to support intervention of right pursuant to FRCP 24(a) is ambiguous, *Portland Audubon Society v. Hodel*, 866 F.2d 302, 308, n.1 (9th Cir. 1989).

> The plaintiffs urge us to find that a party seeking to intervene must have standing, as the D.C. Circuit has held. See *Cook v. Boorstin*, 246 U.S. App. D.C. 201, 763 F.2d 1462, 1470-71 (D.C. Cir. 1985). However, we in the past have resolved intervention questions without making reference to standing doctrine. See, e.g., *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-29 (9th Cir. 1983). The Supreme Court recently declined to decide "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68-69 & n.21, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986) (observing that "the Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing"). Without an en banc review, we must follow the Sagebrush Rebellion analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test. *However, the standing requirement is at least implicitly addressed by our requirement that the applicant must*

> "*assert an interest relating to the property or transaction which is the subject of the action.*" *County of Orange*, 799 F.2d at 537 (quoting *Stringfellow*, 783 F.2d at 826). (Emphasis added).

Contrasting *Portland Audubon Society* with *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980), it is clear that the Ninth Circuit doesn't even remotely analyze an injury in fact for standing purposes in the same way it analyzes a protectable interest for intervention purposes.

> The 'interest test' is basically a threshold one, rather than the determinative criterion for intervention, because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene.

There is, as well, significant discord among the Circuit Courts regarding the nature of the protectable interest required by FRCP 24 to support intervention. The Tenth Circuit Court of Appeals in *San Juan County v. United States*, 503 F.3d 1163, commencing at page 1188, spent approximately 15 pages of its opinion analyzing and comparing the varying position of the Circuit Courts regarding the nature of the interest required by FRCP 24(a)(2). The specific issue there, as here, was the right of an environmental group to intervene as a defendant in a quiet title action. The net result of that decision was very similar to that determined by the Ninth Circuit in *County*

of Fresno; it is not the nature of an aspiring intervenor's interest, rather it is the practical effect of the litigation on the aspiring intervenor which limits the right to intervene.

The Seventh Circuit in *United States v. 36.96 Acres of Land*, 754 F.2d 855, 476 U.S. 1108 (1986) requires the protectable legal interest to be direct, but neither the Tenth Circuit, nor the Ninth Circuit appear to impose a similar requirement, or if they do, "direct" lacks any reasonably defined meaning. In *San Juan County,* commencing at page 1193, the Tenth circuit stated that:

> Whether an interest is direct or indirect could be a matter of metaphysical debate because almost any causal connection can be represented as a chain of causation in which intermediate steps separate the initial act from the impact on the prospective intervenor.

The Tenth Circuit has also held that requiring a direct interest of an intervenor is a "too narrow" construction of Rule 24(a)(2), *Natural Res. Def. Council v. U.S.*, 578 F.3d 1341, 1344 (10th Cir. 1978).

The focus of those two circuits is on "practical harm" and the adequacy of representation as the limiting concepts. There is nothing in those two components that has ever been used to prevent prospective intervenors from joining litigation where their only interest is in promoting or opposing a particular federal policy.

The First Circuit does not find "direct" to be a metaphysical concept, *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir. 1984).

Prudential standing concepts are not required for intervention. This Court has held that application of the prudential standing rules is necessary, at least in part, to insure that the scope of the judiciary's power does not impinge on the rights and responsibilities of the executive and legislative branches of government, *Valley Forge Christian College v. Americans United for Separation*, 454 U.S. 464, 474 (1982).

In theory an intervenor is limited to the proceedings and issues as they stand at the time intervention is granted; and in theory, he is not permitted to enlarge those issues or alter the nature of the proceeding. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944). What is not prevented however, is the actual result in this case. The United States, for its own reasons, does not want to litigate any further whether Elko County has a valid R.S. 2477 easement in the South Canyon, but the intervening environmental groups do. This case was settled by the parties in 2001 slightly over two years after it began. Solely because of the intervention efforts of TWS, the case is now into its ninth year of litigation.

1. ARTICLE III STANDING

The Federal District Court in this case held on June 13, 2003, that proposed intervenor TWS had to

have Article III and Prudential Standing to intervene of right as a Defendant in Elko County's counterclaim seeking to quiet title to a road easement. The District Court conducted the standing analysis only because the Ninth Circuit directed the District Court to allow TWS to intervene in the quiet title counterclaim prior to the District Court completing its FRCP 24(a) intervention analysis, and not as a result of any requirement in the Ninth Circuit that standing is required to intervene as of right.

The Ninth Circuit panel in May, 2008, held that *if* TWS needed Article III standing to intervene, it had it by virtue of its interest in the environment:

> To the extent that the United States is arguing that intervenor-appellants lack any interest in the quiet title action, we believe that position is foreclosed by our prior opinion, in which we held that the intervenors were entitled to intervene because they had the requisite interest in seeing that the wilderness area be preserved for the use and enjoyment of their members. This interest was sufficient to allow them to intervene under Federal Rule of Civil Procedure 24(a) and to satisfy any requirements of Article III standing.

The Ninth Circuit was required to conduct a de novo review of a denial of a motion to intervene, *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), but no standing analysis by the Court of Appeals beyond that quoted above was ever conducted. Because the

Ninth Circuit's decision prevented the District Court from conducting a full analysis of FRCP 24 criteria to intervene, no analysis of intervention criteria was conducted, including the usual presumption that the government is adequately protecting the legal interests of its citizens. See *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania,* 674 F.2d 970, 973 (3d Cir. 1982).

FRCP 24 requires four criteria to be met before intervention will be granted as of right under FRCP 24(a)(2). First, the application must be timely. Second, the intervenor must show an interest relating to the property or transaction which is the subject of the action. Third, the intervenor must show that the disposition of the suit may as a practical matter impair or impede the intervenor's ability to protect that interest. And, fourth, the intervenor must show that the interest is not adequately represented by existing parties, FRCP 24, *United States v. 36.96 Acres of Land*, 754 F.2d 855, 858 (7th Cir. 1985).

The interest of the proposed intervenor must be a significant, legally protectable one, *Donaldson v. United States*, 400 U.S. 517, 531 (1971). A prospective intervenor need not establish that his asserted interest is one that is protected by the statute under which the litigation is brought, rather only that it is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue, *Sierra Club v. United States EPA*, 995 F.2d 1478 (9th Cir. 1993).

The Ninth Circuit claims to be guided in determining whether intervention of right is appropriate, "primarily by practical and equitable considerations." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Intervention rules are interpreted in favor of intervention.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court held that a plaintiff's standing required (1) that an injury in fact be demonstrated that is concrete, distinct, palpable, and actual or imminent; (2) that a causal connection exists between the injury and the conduct complained of be established that is fairly traceable to the challenged action of the defendant; and (3) that there is a substantial likelihood that the requested relief will remedy the alleged injury in fact. If the plaintiff filing the lawsuit does not meet the *Lujan* criteria, there is no case or controversy and the Federal Courts are without jurisdiction to address the merits of the case. The injury in fact must be an invasion of a legally protected interest, *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

Inherent in the Article III analysis of plaintiff's standing in *Lujan* is the corollary proposition that the named defendant must be the person or entity causing an injury that is fairly traceable to him. If the plaintiff names the wrong defendant, although the case might be dismissed through a variety of procedures, it is fundamental that there can be no Article III case or controversy. TWS clearly has not done, nor

could it do, any injury to Elko County that is remediable in a quiet title action.

This Court has held that a change in use of real property that effects the environment is an injury in fact sufficient to lay the basis for standing under the Administrative Procedure Act, *Sierra Club v. Morton*, 405 U.S. 727 (1971) at page 734.

> The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

But in *Bennett v. Spear*, 520 U.S. 154, 163 (1997), this Court warned that what suffices for an injury in

fact under the Administrative Procedure Act might be less than what is required for other purposes.

The expansive "injury in fact" language in *Sierra Club v. Morton* is virtually identical in substance to the language of the Ninth Circuit in this case, but this case is a quiet title action, not an APA action.

Imposing Article III standing requirements in place of intervention's protectable interest requirement is a reasonable procedural means to prevent those without a title interest from improperly intervening in quiet title actions. Alternatively, as a practical matter, it does not matter whether standing is required for FRCP 24 intervention as held in *Southern Christian Leadership Conference v. Kelley*, 241 U.S. App. D.C. 340, 747 F.2d 777 (D.C. Cir. 1984) or a showing of a greater interest is required for intervention than for standing as held in *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1984), so long as there is also required to be shown a direct causal connection between the conduct complained of that is fairly traceable to the challenged action of the Defendant.

2. PRUDENTIAL STANDING

The Ninth Circuit panel opinion of May 2008 did not address prudential standing. Without prudential limitations, the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions, *Warth v. Seldin,*

422 U.S. at 499-500 (1975). Under the rules of prudential standing, the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim, *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979).

Among prudential considerations, the plaintiff's complaint must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970). There does not seem to be any reason why a proposed intervenor on behalf of a defendant, regardless of whether Article III standing is otherwise required, should not be required to demonstrate that their interests fall within the zone of interests protected by the law upon which the suit is premised. Absent such a requirement, as in this case, an intervenor may join litigation for no reason other than to promote or denigrate executive discretionary policy.

Indeed, if this Court were not inclined to require Article III standing for intervenors in quiet title actions, requiring a prudential standing interest alone would substantially assist the lower courts in defining significant protectable legal interests required by FRCP 24(a).

That Congress can and does modify prudential standing requirements is clear, *Bennett v. Spear*, 520 U.S. 154, 162 (1997). This Court held that Congress

legislates against a background of this Court's prudential standing doctrine. *Id.* at 163. Congress has conferred both Article III and Prudential standing to a broad range of potential plaintiffs through the Administrative Procedure Act, Section 10(a), as well as the citizen suit provisions of some environmental and other statues, 33 U.S.C. § 1365(g) (Clean Water Act), 30 U.S.C. § 1270(a) (Surface Mining Control and Reclamation Act), 15 U.S.C. § 797(b)(5) (Energy Supply and Environmental Coordination Act); 42 U.S.C. § 9124(a) (Ocean Thermal Energy Conversion Act), 7 U.S.C. § 2305(c), 15 U.S.C. § 72.

Presumably, Congress also legislates against a background of this Court's intervention decisions, and would be aware that certiorari was denied by this Court to review the Seventh Circuit decision in *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), cert. denied, 476 U.S. 1108 (1986), a condemnation case denying intervention based on environmental concerns.

Congress has not made any effort whatsoever to alter 28 U.S.C. § 2409, or any related statutes, in a way that suggests it wants environmental concerns litigated in quiet title actions.

Allowing TWS to intervene as of right in this case without meeting Article III and/or prudential standing requirements in an action under the Quiet Title Act, 28 U.S.C. § 2409, which statute this court has described as being the exclusive procedure by which a claimant can judicially challenge the title of the

United States to real property, *Block v. North Dakota*, 461 U.S. 273 (1983), is fundamentally at odds with the general principals set forth above.

3. MOOTNESS

Even if this Court finds that it is not generally necessary for TWS to establish Article III and Prudential Standing to intervene in a quiet title action as a defendant, the fact that the case was moot at the time TWS moved for intervention, or became moot when the United States Forest Service independently decided to open a road to motorized traffic in the South Canyon regardless of the outcome of the quiet title counterclaim, required TWS to establish standing, *Tosco Corp. v. Hodel*, 804 F.2d 590 (10th Cir. 1984).

An actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed, *Preiser v. Newkirk*, 422 U.S. 395 (1975); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). The requisite personal interest that must exist at the commencement of litigation must continue throughout its existence, *Arizonans* at page 67.

There is no division among the Circuit Courts that one seeking to intervene in an otherwise moot case in which all parties have settled all issues, must have standing. *Tosco Corp. et al. v. Hodel*, 804 F.2d 590 (10th Cir. 1984); and *Bay Area Nuclear Waste Coalition v. Lujan*, 42 F.3d 1398 (9th Cir. 1994) must

have Article III standing; *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Roe v. Wade*, 410 U.S. 113 (1973); *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403 (1972); *United States v. Munsingwear*, 340 U.S. 36 (1950); *Yniquez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991).

Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, *Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 U.S. 8, 4 Dall. 8, 11, 1 L. Ed. 718 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936). Federal Courts are, as a consequence, required to examine jurisdiction before they proceed to the merits of the case, *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

On March 2, 2001, the original parties reached an agreement as to all issues in the case. TWS did not seek to intervene until March 30, 2001. No justiciable controversy exists when the question sought to be adjudicated has been mooted by subsequent developments, *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308 (1893); *Massachusetts v. EPA*, 549 U.S. 497 (2007). A case is moot when the issues

presented are no longer "live" or the parties lack a legally cognizable interest in the outcome, *Powell v. McCormack*, 395 U.S. 486, 496 (1969). A settlement agreement resolving all facets of the dispute between the parties moots the case, *Gator. Com v. L.L. Bean, Inc.,* 398 F.3d 1125, 1131 (2005).

The District Court approved the Settlement Agreement on Sept. 19, 2006. Even if the earlier decision of the District Court staying the effectiveness of the agreement kept the case or controversy alive, that changed on Sept. 19, 2006, when the stay was lifted.

Additionally, the District Court in its June 13, 2003, order clearly stated that TWS' only interest in the litigation was that if Elko County prevailed a road open to motorized traffic would exist, and that if the United States prevailed, no such road would exist.

The Ninth Circuit acknowledged in its opinion, 526 F.3d at page 1242, that the United States Forest Service's independently determined decision to repair the road might well create a mootness issue:

> We are aware that other events have taken place that may bear on the proceedings in this case. The intervenor-appellants have filed an independent action in District Court to challenge the Forest Service's decision to open a road to vehicular traffic and we are also aware that the construction of the road has begun. We express no opinion on the

> merits of this independent action or whether, on remand, any party may successfully contend that the matter has become moot.

The Ninth Circuit was required to decide mootness, not leave it for another day. An appellate court is under a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it, or make no contention concerning it, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

It is particularly important in this case that mootness be decided if this Court determines that Article III standing is not generally necessary to intervene in an action under the Quiet Title Act. If the decision of the Ninth Circuit is allowed to stand as is, that Article III standing exists solely as a consequence of TWS' interest in preserving a wilderness without a specific statutory predicate, or any other analysis, it is precedent for the proposition that Article III standing has no Prudential standing component which is exactly contrary to this Court's prudential standing decisions, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-562 (1992).

CONCLUSION

Unless all the requirements of standing – Article III and Prudential – are imposed on prospective intervenors in quiet title actions where the only issue is who has title to a piece of property, both Article III and Prudential requirements are emasculated and are meaningless.

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Respectfully submitted,

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