JAMES S. ANGELL, *Pro Hac Vice*
jangell@earthjustice.org
EDWARD B. ZUKOSKI, *Pro Hac Vice*
tzukoski@earthjustice.org
Earthjustice
1400 Glenarm Place, Ste. 300
Denver, CO 80202
Tel: (303) 623-9466
Fax: (303) 623-8083

MICHAEL R. SHERWOOD, CA Bar No. 63702
Earthjustice
426 17th Street, 5th Floor
Oakland, CA 94612
Tel: (510) 550-6725
Fax: (510) 550-6749
msherwood@earthjustice.org

Attorneys for Proposed Defendant-Intervenor Applicants

LISA T. BELENKY, CA Bar No. 203225
Center for Biological Diversity
1095 Market Street, Ste. 511
San Francisco, CA 94103
Tel: (415) 436-9682 x307
lbelenky@biologicaldiversity.org

Attorney for Proposed Defendant-Intervenor Center for Biological Diversity

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

COUNTY OF INYO, Plaintiff, v. UNITED STATES DEPARTMENT OF INTERIOR, *et al.* Defendants, and SIERRA CLUB, *et al.* Proposed Defendant-Intervenors.	Case No: 1:06-cv-1502 AWI-DLB **REPLY MEMORANDUM IN SUPPORT OF SIERRA CLUB, *ET AL.*'S MOTION TO INTERVENE** Date: April 30, 2007 Time: 1:30 p.m. Room: Courtroom 3, 5th Floor Judge Anthony W. Ishii

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INTRODUCTION

Inyo County asks this Court to order the National Park Service to tear down barricades and allow public motor vehicle use through protected areas within Death Valley National Park. Such relief strikes at the very heart of the proposed intervenor Conservation Groups' legally protected interests. Nevertheless, Inyo County and the Department of the Interior (DOI) ask this Court to exclude Conservation Groups from this litigation. In so doing, they seek to have this Court to adopt a narrow – and unprecedented – intervention rule in Quiet Title Act (QTA) cases. This narrow interpretation has no basis in Rule 24's text and is contrary to caselaw. Because QTA cases do not merit special treatment under Rule 24, this Court, like any court in this circuit, must "construe Rule 24(a) liberally in favor of potential intervenors." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006).

ARGUMENT

I. THE CONSERVATION GROUPS MERIT INTERVENTION AS OF RIGHT.

A. The Conservation Groups Have Legally Protectable Interests Relating To This Litigation.

To demonstrate a "significant protectable interest," an applicant must show that "(1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (citation & quotation omitted). The Conservation Groups meet this test.

1. Intervenors Need Only Assert An Interest Protectable Under Some Law.

Inyo County and DOI contend that, to intervene in this QTA suit, Rule 24(a) requires the Conservation Groups to assert an ownership interest in the disputed property. Inyo County Memo. in Opp. to Sierra Club Et Al.'s Mtn. To Intervene (Mar. 21, 2007), Docket No. 23 ("Inyo Memo.") at 11-13, United States' Memo. in Opp. to Sierra Club Et Al.'s Mtn. For Leave to Intervene (Mar. 21, 2007), Docket No. 24 ("DOI Memo.") at 10-15. They are wrong. Ownership interest is irrelevant for purposes of intervention under Rule 24(a).

Although the QTA requires a plaintiff to assert an ownership interest, Rule 24 does not demand the same of a proposed intervenor. Rule 24(a) does not require an intervenor's interest to be

one that could give rise to a suit under the statute the plaintiff relies on in its complaint. This is exemplified in *Trbovich v. United Mine Workers*, 404 U.S. 528, 535-37 (1972), in which the Supreme Court allowed a party to intervene as a plaintiff even though it could not have filed suit under the statute relied upon by the original plaintiff. *See Georgia v. Ashcroft*, 539 U.S. 461, 476-77 (2003) (upholding order allowing private citizens to intervene in voting rights case when they could not have filed suit and would not have been properly named original defendants).

The Ninth Circuit has followed this controlling precedent, observing that "[a]n applicant seeking to intervene need not show that the interest he asserts is one that is protected by statute under which litigation is brought. It is enough that the interest is protectable under any statute." *United States v. Alisal Water Corp*., 370 F.3d 915, 919 (9th Cir. 2004) (emphasis added) (quotation and citation omitted); *Arakaki v. Cayetano*, 324 F.3d 1078, 1085 (9th Cir. 2003) (noting protectable interests are not limited to those interests protected by the statute under which the litigation was brought); *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993) (interest need not be protected by statute under which litigation was brought).[1]

Accordingly, under Ninth Circuit law, the QTA's requirement that a plaintiff assert an ownership interest has no application to a proposed intervenor under Rule 24. Instead, a proposed intervenor must demonstrate only that it has an interest protectable under any statute. *Alisal Water Corp.*, 370 F.3d at 919. Here, the Conservation Groups assert ecological, biological, scientific, historic, and aesthetic interests legally protected by a variety of federal environmental statutes, including the California Desert Protection Act, the Wilderness Act, the National Park Service

[1] As the D.C. Circuit noted, the "whole point of intervention is to allow the participation of parties with interests distinct from those of the original parties." *Cook v. Boorstin*, 763 F.2d 1462, 1471 (D.C. Cir. 1985). *See also Jones v. Prince George's County*, 348 F.3d 1014, 1018 (D.C. Cir. 2003) ("intervenors of right need only an 'interest' in the litigation – not a 'cause of action' or 'permission to sue.'"); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001) (allowing intervention as a defendant although applicant could not originally have been a proper party defendant under the statute relied upon by the plaintiff); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996) ("[t]he strongest case for intervention is … where the intervenor-aspirant has no claim against the defendant yet a legally protected interest that could be impaired by the suit. For it is here that intervention may be essential."); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 726 (1968) (parties should be able to intervene as defendants "even though [they have] no claim that could be asserted against any of the parties and they have none that could be asserted against [them]").

Organic Act, the National Historic Preservation Act, and the Endangered Species Act. *See* Memo. in Support of Sierra Club Et Al.'s Mtn. To Intervene (Jan. 18, 2007), Docket No. 8 ("Conservation Memo.") at 18-19. Courts, including the Ninth Circuit, repeatedly have recognized that such interests satisfy Rule 24, particularly when they involve public lands. *See, e.g.*, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (interest in wildlife preservation legally protectable); *see also Utah Ass'n of Counties*, 255 F.3d at 1253-54 (organizations have legally protectable interest in litigation that threatens their conservation goals); *Mausolf v. Babbitt*, 85 F.3d 1295, 1302 (8th Cir. 1996) (same, in case that threatened to overturn motor vehicle use restrictions in National Park). There is no dispute that where conservation groups possess interests in ecological, aesthetic, and related interests, they may legally protect those interests in the federal courts.[2] Because their legally protected interests may be harmed by the relief Inyo County seeks under the QTA, *see infra*, at 13-16, the Conservation Groups satisfy Rule 24(a)'s "interest" requirement.[3]

DOI cites *Donaldson v. United States*, 400 U.S. 517 (1971), for the proposition that Rule 24 does not permit intervention for those merely concerned with litigation. DOI Memo. at 8. In fact, *Donaldson* shows why the Conservation Groups here merit intervention. In *Donaldson*, a taxpayer attempted to intervene when federal investigators sued to enforce a summons that sought documents from his former employer. *Id*. at 520-21. Although he had an "interest" in keeping potentially incriminating information from the government, the Supreme Court held the taxpayer lacked any "legally protectable interest" under Rule 24 because he had no "proprietary interest," the documents were not the "work product of his attorney or accountant," and they were not subject to any

[2] Even in the more demanding standing context, the Supreme Court has recognized that harm to "environmental" interests may satisfy Article III's injury requirement. *See, e.g.*, *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) (observing conservation organizations may establish injury in fact by alleging impairment of aesthetic and recreational interests); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (noting that harm to ecological, aesthetic, and other environmental concerns may establish "injury" prong of standing test).

[3] Contrary to DOI's implication, the Conservation Groups do not claim the nature of the underlying litigation is irrelevant to Rule 24's analysis. DOI Memo. at 8-9. The claims at issue in the case affect the potential relief and thus determine whether intervenors' interest could be impaired by the litigation. In this case, the relief sought by Inyo County – that barriers be torn down, that motor vehicles use be permitted, and that highway rights-of-way be recognized inside wilderness in a National Park – clearly implicates the Groups' interests. *See infra* at 13-16.

"established attorney-client or other privilege." *Id*. at 530. If his interests in the documents had enjoyed legal protection under a privilege, for example, the taxpayer would have been entitled to intervene. *See also Sierra Club v. EPA*, 995 at 1485 (construing *Donaldson*). Similarly, because Conservation Groups here have interests in the preservation of ecological and aesthetic values in Death Valley National Park that are protected by numerous federal laws, they are entitled to intervene.

Although Inyo County and DOI contend the Conservation Groups' lack of ownership interest precludes their intervention here, courts in the Ninth Circuit have repeatedly allowed third parties to intervene in QTA litigation in order to protect interests other than property claims.[4] *See, e.g.*, *McFarland v. Norton*, 425 F.3d 724 (9th Cir. 2005) (caption noting that conservation group intervened in QTA case); *California ex rel. State Lands Comm'n v. United States*, 805 F.2d 857, 865-66 (9th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) (affirming grant of permissive intervention by conservation groups); *Alleman v. United States*, No. Civ. 99-3010-CO, 2003 WL 23975165, at *4 (D. Or. Nov. 10, 2003) (finding conservation groups' recreational, environmental, and aesthetic interests in wilderness lands sufficient to merit intervention where plaintiff sought, *inter alia*, title to route across wilderness), attached as Exh. 1; Conservation Memo. at 17-18 n.6 (citing cases).[5] That Ninth Circuit courts have routinely allowed conservation groups to intervene in cases where plaintiffs seek rights-of-way across public lands is consistent with the Ninth Circuit's position that Rule 24(a) should be "construe[d] liberally in favor of potential intervenors." *California ex rel. Lockyer*, 450 F.3d at 440. This Court need not depart from this precedent.

DOI attempts to dismiss the aforementioned cases because they "do not address" the government's anti-intervention arguments. DOI Memo. at 11. However, in the appeal of *United States v. Carpenter*, the United States argued – just as it does here – that "[a]n entity without a

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[4] Courts in other circuits have permitted intervention in QTA cases even when the proposed intervenor has asserted no ownership interest in the disputed property. *See San Juan County v. United States*, 420 F.3d 1197, 1207-13 (10th Cir. 2005) (reversing district court decision denying conservation groups' motion to intervene in QTA case), *reh'g en banc pending*.

[5] In contrast to the multiple cases in which the Ninth Circuit has allowed intervention, neither Inyo County nor DOI has directed this Court to a single opinion in this Circuit that denies intervention in a QTA case because the applicants lacked a property interest in the disputed land.

property interest has no place in a dispute to determine ownership of that property." United States Brief, at 29, attached as Exh. 2. Despite the government's argument in that case, the Ninth Circuit reversed the district court's denial of intervention and remanded with express directions to grant the conservation groups' motion to intervene. *United States v. Carpenter*, 298 F.3d 1122, 1125-26 (9th Cir. 2002). While the Ninth Circuit's opinion did not specifically discuss the issue, its direction that intervention be allowed on remand necessarily means the court rejected the United States' argument.[6] This Court should do the same.

DOI contends several cases support its claim that no one can participate in a QTA case "as a plaintiff or defendant who does not claim a property interest to which the title may be quieted." DOI Memo. at 11 (quoting *Long v. Area Manager*, 236 F.3d 910, 915 (8th Cir. 2001)). However, none of those cases – including the one it quotes – speaks to intervention under Rule 24(a) or to who may defend a QTA claim. Instead, DOI's cases deal with who may file a QTA claim. As noted above, however, the QTA's pleading requirements for plaintiffs initiating an action have no bearing on who may intervene as a defendant.[7]

DOI also argues that only those asserting a property interest may participate in QTA litigation because to do otherwise "is inconsistent with the [QTA's] limited waiver of … federal sovereign immunity." DOI Memo. at 17. While plaintiffs without claim to title cannot satisfy the

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[6] *See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1409 (9th Cir. 1991) (deciding the Supreme Court "implicitly decided" an issue raised by a party when the Court's opinion did not explicitly decide the issue, but was wholly inconsistent with that party's argument); *Int'l In-Flight Catering Co. v. Nat'l Mediation Bd.*, 555 F.2d 712, 719 (9th Cir. 1977) (same).

[7] DOI's reliance on the Special Master's report in *Alaska v. United States*, No. 128, Original (Nov. 2001), is unwarranted. DOI suggests the Special Master's report stands for the proposition that applicants lacking property interests may not intervene in QTA cases. *See* DOI Memo. at 10, 13, 17. However, as the Special Master's report itself notes, the "Supreme Court does not necessarily follow Rule 24 when ruling on motions to intervene in original actions" such as *Alaska v. United States*. Special Master's Report at 25 (DOI Memo. at Attachment 2). Instead, in original jurisdiction cases, the Supreme Court has severely restricted the ability of parties to intervene because original actions involve conflicts between sovereigns that can be presumed to represent the interests of their citizens. *Id*. at 11-13. Thus, intervention is allowed by private parties in these cases only where "exceptional circumstances" or a "compelling interest" exist. *Id*. at 13. No such test is applied under Rule 24. *See id*. at 25. The Special Master in *Alaska v. United States* concluded Supreme Court caselaw can even bar those who claim a property interest from intervening in original cases. *See id*. at 12 (citation omitted). Such a rule would go far beyond what DOI argues here, and finds no support in Ninth Circuit law concerning Rule 24(a).

QTA's pleading requirement (and so fall outside the QTA's limited waiver of sovereign immunity, *Sw. Four Wheel Drive Ass'n v. BLM*, 363 F.3d 1069, 1071 (10th Cir. 2004), no such concern exists here because neither the QTA nor general sovereign immunity principles limit who may be a defendant supporting the United States. *See Int'l Mortgage & Investment Corp. v. Von Clemm,* 301 F.2d 857, 863-64 (2d Cir. 1962) (that United States must consent to be sued does not mean it must consent to be defended); Wright, Miller & Kane, *Federal Practice and Procedure* § 1917 at n.67 (2d ed. 1986) (same). Further, nothing in the QTA or the cases interpreting it amends Rule 24(a)(2) or suggests any special limitation on the right of interested persons to intervene in an action that has been properly commenced by others. For all these reasons, DOI's "ownership interest" argument fails.

2. DOI's Proposed Property/Transaction Dichotomy Must Be Rejected.

DOI also argues Rule 24(a)(2)'s interest requirement differs depending on whether the case involves "property" or a "transaction." DOI Memo. at 12-13. Rule 24 draws no such distinction, and no court in the Ninth Circuit (or elsewhere) has recognized DOI's proposed dichotomy. This Court should reject DOI's unprecedented – and unworkable – interpretation.

First, endorsing DOI's proposed "property/transaction" dichotomy would contradict the purpose of the 1966 amendments to Rule 24. The 1966 amendments combined separate subsections of the old Rule 24 – one for intervention in general and one for intervention based on interests in property – into a single section with a unitary standard for intervention. In creating this unitary standard, the drafters explicitly endorsed the expansive meaning of "interest" embraced in cases that had allowed intervention in "almost any in personam action" based on property interests. *See* 1966 Amendments, Adv. Comm. Notes for Fed. R. Civ. P. 24 (stating that the only question under the new rule is whether the "absentee would be substantially affected in a practical sense by the determination in an action"). As one advisory committee member explained, the 1966 amendment to Rule 24(a) "was intended [in part] to drive beyond the narrow notion of an interest in specific property." Benjamin Kaplan, *Continuing Work for the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 405 (1967). Second, the Supreme Court has already rejected DOI's reading of Rule 24. In 1967, the Court concluded potential intervenors

need not assert an ownership claim to intervene based on an interest in property. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133 (1967) (interpreting even the narrower, pre-1966 amendment version of Rule 24 to allow intervention in property disputes by those without an ownership interest).

DOI attempts to prop up its failed "property/transaction" argument by equating it to an alleged distinction between cases involving "traditional" actions and those involving "administrative" actions. DOI Memo. at 12-13. The words "traditional" and "administrative" do not appear in Rule 24(a)(2), and no court or commentator has ever linked these two supposed dichotomies.[8] This Court should reject DOI's invitation to be the first. DOI cobbled together its purported traditional/administrative dichotomy from a thirty-year old law review note that contrasted "traditional" cases with government enforcement actions, which the author described as "administrative." Note, *Intervention in Government Actions*, 89 Harv. L. Rev. 1174, 1177 (1976) ("Harvard Note"); *see also United States v. Hooker Chem. & Plastics Corp.*, 749 F.2d 968, 983-84 (2d Cir. 1984) (describing Harvard Note's distinction). Because the "administrative" half of the dichotomy refers to government enforcement actions, it has nothing to do with whether the underlying action concerns "property" or a "transaction," and offers no support for DOI's "property/transaction" theory.

Not only is DOI's proposed property/transaction dichotomy contrary to the text of Rule 24, to the intent of the Rule's framers, and to Supreme Court precedent, it would be utterly unworkable. For example, some actions may not belong to either the "property" or the "transaction" category. Most disputes over property ownership also involve a dispute over a "transaction" between the parties, such as whether a sale was consummated or a lease was granted. Even determinations regarding claimed R.S. 2477 rights-of-way under the QTA are not easily confined to one category:

[8] DOI contends *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993), supports its "property/transaction" dichotomy because the opinion distinguishes rights traditionally protected by law with certain lesser interests, which DOI characterizes as "administrative" actions. DOI Memo. at 12. DOI claims the "property" half of its proposed dichotomy corresponds to the "traditional" interests described in *Sierra Club*. *Id*. However, *Sierra Club*'s enumeration of examples of rights "traditionally protected by law" includes not only rights to "real or personal property," but rights derived from transactions such as "contracts" and "permits." *Sierra Club*, 995 F.2d at 1482. Accordingly, *Sierra Club* does not support DOI's supposed "property/ transaction" dichotomy.

they could be viewed as adjudications of a property right, or they could be viewed as an adjudication to determine whether a past transaction – the transfer of the right-of-way from the federal government to the state and local government – was completed. DOI's interpretation of Rule 24(a) could open the door to manipulation of pleadings by parties seeking to exclude potential intervenors with legitimate interests, and would invite arbitrary and unpredictable results. This Court should reject this ill-conceived scheme.

3. The Conservation Groups' Interests "Relate To" The Plaintiff's Claims.

a. The Relief Sought By Inyo County May Result In Management Changes That Adversely Affect The Conservation Groups' Interests.

Intervenors must show "there is a relationship between its legally protected interest and the plaintiff's claims." *Donnelly*, 159 F.3d at 409 (9th Cir. 1998) (citation & quotation omitted). "An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Id.* at 410. Accordingly, courts must look to the relief requested by the plaintiff to determine the potential impact on a proposed intervenor's interests. *See id*. at 410-11 (looking to "plaintiffs' potential remedies" to determine whether proposed intervenors' interests would be impaired); *see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1497 n.9 (9th Cir. 1995) ("[W]e must analyze the appellants' [proposed intervenors'] interests relative to the prayer for relief in the plaintiffs' complaint.").

Inyo County and DOI assert the Conservation Groups' interests do not "relate to" the disputed rights-of-way because those interests concern the management of property, whereas Inyo County's QTA suit is concerned only with "the ownership of property." Inyo Memo. at 5 (emphasis added); *see also* Inyo Memo. at 12-13; DOI Memo. at 14-15. They are incorrect. The Court need look no further than Inyo County's complaint to see that a County victory could affect both the management of the disputed routes and the Conservation Groups' ecological, biological, scientific, historic, and aesthetic interests in the lands traversed by the disputed routes. Even after abandoning some elements of its requested relief in its opposition memo, Inyo County asks this court to determine whether DOI "may prevent motorized passage over" the disputed rights-of-way, and "to order the Defendants to remove barriers" to the rights-of-way. Inyo Memo. at 4. In other words,

Inyo County seeks a court order requiring DOI to tear down its barriers and to allow motor vehicle use in Greenwater Canyon, Last Chance Canyon, and Greenwater Valley, which have been closed to such use for many years due, in part, to the Conservation Groups' efforts. Conservation Memo. at 5-12, 15-16 (describing Groups' protection efforts). Such relief would directly harm the Conservation Groups' interests in preserving these specific places. *See infra*, at 13-16.[9] Thus, there is a direct relationship between the Groups' legally protectable interests and the County's claims in this case.

Inyo County asserts the Conservation Groups' interests are unrelated to this litigation, citing *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996). Inyo Memo. at 10. *Northwest Forest*, however, is distinguishable. In that case, environmental groups sought to intervene in a timber industry lawsuit challenging the government's interpretation of section 2001(k)(1) of the 1995 Rescissions Act, which governed certain timber sales in the Northwest. *Nw. Forests*, 82 F.3d at 828. The environmental groups in *Northwest Forest* asserted various conservation interests protected by environmental laws. *Id*. at 837. However, section 2001(k)(1) of the 1995 Rescissions Act "explicitly preempt[ed]" environmental laws such that they had no application to timber sales conducted pursuant to that law. *Id*. Because the environmental laws that protected the applicants' conservation interests were inapplicable to the timber sales at issue, the Ninth Circuit determined the groups' interests did not relate to that litigation, and upheld the denial of intervention. *Id*. Unlike the 1995 Rescissions Act, the QTA does not preempt environmental laws, so those laws still apply to the alleged routes in Death Valley and still protect the Conservation Groups' interests in those areas. Consequently, the Conservation Groups' interests may be affected by, and so "relate to," the County's QTA suit. *See infra*, at 13-16.

b. The Conservation Groups' Intervention Is Not Barred By *Portland Audubon Society v. Hodel* or *Sierra Club v. EPA*.

Inyo County and DOI contend the Conservation Groups are barred from intervening in this litigation because, under the Ninth Circuit's rulings in *Portland Audubon Society v. Hodel*, 866 F.2d

[9] Rule 24's requirement that there be a relationship between the applicant-in-intervention's legally protected interest and the plaintiff's claims, and that the applicant-in-intervention's interest as a practical matter be impaired by the relief sought, are closely related and often addressed together. *See FDIC v. Jennings*, 816 F.2d 1488, 1492 (10th Cir. 1987); Wright, Miller & Kane, *Federal Practice and Procedure* § 1908 n.4 (2d ed. 1986).

302 (9th Cir. 1989) and *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993), they do not satisfy Rule 24(a)'s interest test. Inyo at 9-11; DOI at 8-10.[10] Neither case aids their position.

In *Portland Audubon*, timber industry groups sought to intervene in a challenge brought by environmental organizations under the National Environmental Policy Act (NEPA). *Portland Audubon*, 866 F.2d at 308. While the industry groups had an "economic stake in the outcome" of the case, the Ninth Circuit concluded they had "no protectable interest justifying intervention as of right" because timber companies have no legal right to timber contracts. *Id*. at 309. In a subsequent case, the court described the industry groups' economic interest as "based upon a bare expectation." *Sierra Club*, 995 F.2d at 1482. Because the Ninth Circuit concluded the industry groups' purely economic interest was not protectable, it upheld the district court's denial of intervention. *Portland Audubon*, 866 F.2d at 309. In contrast to the industry groups' economic hopes, which are not protected under any law, the Conservation Groups' interests are protected under a range of environmental laws. *See* Conservation Memo. at 18-19. Because the Groups have asserted interests protectable under some law, they satisfy Rule 24(a)'s interest requirement. *Alisal Water Corp.*, 370 F.3d at 919.

Inyo County also argues *Sierra Club v. EPA* precludes this Court from granting the Conservation Groups' motion to intervene. In dicta in *Sierra Club*, the Ninth Circuit noted that, "[s]ince NEPA requires only action by the government, no private party can comply with NEPA. It is for that reason that in a lawsuit to compel compliance with NEPA, no one but the government can be a defendant." *Id*.[11] Inyo County argues that, like NEPA, a QTA claim "applies only to the government" and thus DOI is "the only appropriate defendant[] in this action." Inyo Memo. at 10. This argument must fail.

The above-quoted dicta of *Sierra Club* refers only to "lawsuit[s] to compel compliance with NEPA," *Sierra Club*, 995 F.2d at 1485, and the Ninth Circuit has not applied it to suits under the

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[10] The Ninth Circuit has made clear that Rule 24(a)'s interest requirement does not apply to applicants seeking permissive intervention under Rule 24(b). *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002).

[11] In *Forest Conservation Council*, the Ninth Circuit recognized this portion of *Sierra Club* as nonbiding dicta. *See Forest Conservation Council*, 66 F.3d at 1493 n.6.

QTA. This Court should decline Inyo County's invitation to so extend this narrow statement because the reasoning underlying the *Sierra Club* dicta does not apply to QTA cases. According to *Sierra Club*, the government's compliance with NEPA is purely procedural, so the outcome of a NEPA case has no immediate on-the-ground effect and cannot affect intervenors' interests. *See id.* at 1485 (noting an injunction requiring an environmental impact statement under NEPA "would not by its terms prevent or change the terms of" the underlying action). In contrast, the outcome of this QTA suit will determine who owns the disputed rights-of-way and how the owner may use the rights-of-way, since a right-of-way is a right to use. *See infra*, at 14-15. Thus, unlike the outcome of a NEPA case, the outcome of this QTA case may directly affect the interests of the Conservation Groups by opening the County's three alleged highway rights-of-way to public motor vehicle use. *See infra*, at 13-16. Because the Conservation Groups' interests will be injured by the relief the County seeks, they have significantly protectable interests that relate to the property that is the subject of Inyo County's action, and have therefore satisfied Rule 24(a)(2)'s interest test. *See Forest Conservation Council*, 66 F.3d at 1494-95.[12]

c. The Conservation Groups' Advocacy For The Disputed Routes Establishes An "Interest" Under Rule 24.

Under Ninth Circuit law, "a public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *see also Nw. Forest Res. Council*, 82 F.3d at 837 (allowing public interest groups to intervene as of right when the groups "were directly involved" in the law that is being challenged.); Conservation Memo. at 22-23. Because the Conservation Groups worked long and hard to protect Death Valley National Park wilderness areas from motor vehicle travel, and because Inyo County's relief threatens to undermine or eliminate that protection, the Conservation Groups satisfy Rule 24's interest requirement.

[12] *Forest Conservation Council* notes that, in cases where an intervenor-applicant's interests are not affected by the merits phase of the underlying litigation, but will be affected by the remedy phase, a court may limit intervention to the remedial stage of the litigation. *See Forest Conservation Council*, 66 F.3d at 1495-96. Here, a finding on the merits in this case will harm Conservation Groups. If Inyo County succeeds on the merits of its R.S. 2477 claims, it will gain rights to use rights-of-way against the federal government. *See infra* at 14-15.

Inyo County argues these cases "do not support intervention" here because the County's complaint does not challenge the California Desert Protection Act ("CDPA") or the establishment of Death Valley National Park wilderness areas – protective legislation the Conservation Groups worked to enact. Inyo Memo. at 11-12; *see also* DOI Memo. at 9 (making similar argument). Instead, Inyo County argues, this is merely a dispute about title, and "[e]nvironmental or conservation issues play no role." Inyo Memo. at 12. This argument ignores the relief sought in the County's complaint and mischaracterizes the consequences of a finding that the County has a right-of-way. The County seeks an order requiring the National Park Service to tear down barriers blocking motor vehicle use and to permit such use within protected areas of Death Valley National Park. If this Court grants the County the relief it seeks, the wilderness protections that now bar public motor vehicle travel on the disputed routes and for which Conservation Groups long fought will be undermined. *See* Conservation Memo. at 21-22, and Exh. 25 at 38 (DOI report concludes use of rights-of-way within wilderness could harm "wilderness values"). Thus, for practical purposes, the instant litigation does challenge the protective legislation the Conservation Groups worked to enact. Accordingly, cases such as *Idaho Farm Bureau* and *Northwest Forest Resources Council* support the Conservation Groups right to intervene.[13]

B. The Relief Inyo County Seeks May Impair The Conservation Groups' Interest In Preserving Death Valley National Park.

In order to satisfy Rule 24's impairment requirement, a would-be intervenor must show only that the litigation "may as a practical matter impair or impede" its ability to protect its interest. Fed.

[13] Inyo County asserts its claims of public highways within protected park lands are not contrary to the Conservation Groups' interests in preserving the protections the CDPA and the Wilderness Act afford those areas. Inyo at 5-6 n.3. It argues these laws exclude valid existing rights and therefore offer no protection to its R.S. 2477 claims. *Id*. The County avers that, because the disputed routes are not protected by the acts, the Groups' interest in defending those acts is unaffected by Inyo County's suit. *Id*. However, this argument presupposes the outcome of the litigation, presuming what the County has not yet proved in this case, namely that valid rights-of-way exist. Further, the County's argument ignores that Congress set aside lands in Greenwater Canyon, Last Chance Canyon, and Greenwater Valley as wilderness. *See* CDPA, Pub. L. No. 103-433, § 2(b), 108 Stat. 4471 (purpose of CDPA includes "secur[ing] for the American people of this and future generations an enduring heritage of wilderness"); *id*. at § 2(b)(1), 108 Stat. 4472 (purpose of CDPA's wilderness designation includes perpetuating lands "in their natural state," and "maintain[ing] wilderness resource values"). Inyo County's assertion of highway rights is, thus, contrary to the CDPA.

R. Civ. P. 24(a)(2). "Rule 24 'refers to impairment "as a practical matter." Thus, the court is not limited to consequences of a strictly legal nature.'" *Forest Conservation Council*, 66 F.3d at 1498 (quoting *Natural Res. Def. Council Inc. v. U.S. N.R.C.*, 578 F.2d 1341, 1345 (10th Cir. 1978)); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (absentee generally entitled to intervene where substantially affected in a practical sense by outcome of action). Inyo County and DOI argue the Conservation Groups cannot meet this low threshold because the County's case has nothing to do with land management.

This argument is undercut entirely by Inyo County's complaint and its memorandum, which explicitly request court orders dictating how and by whom the three routes at issue will be managed. The County's complaint seeks a court order that would require DOI to tear down barriers that block motorized access to the alleged routes, which the County reaffirms in its memo. *See* Complaint at Request for Relief ¶ 2; Inyo Memo. at 4. The County also seeks an order that DOI cannot "prevent motorized passage" over its claimed rights-of-way. Inyo Memo. at 4; *see also* Complaint at Request for Relief ¶ 3. Motorized vehicle use on the three routes could crush and destroy vegetation, and kill, frighten, or injure wildlife, among other impacts, thus threatening the ecological, biological, scientific, historic, and aesthetic interests of the Conservation Groups. *See* Conservation Memo. at 20-21. This case squarely implicates land management and whether DOI will retain the authority to protect ecologically sensitive areas within a national park. Thus, Inyo County's claims "may as a practical matter impair or impede" the Conservation Groups' ability to protect its interests.

Even if Inyo County's request for relief had not explicitly requested court-ordered removal of barriers and opening of the disputed routes to motor-vehicle use, its QTA claim could still affect management of Greenwater Canyon, Last Chance Canyon, and Greenwater Valley.[14] As with any

[14] DOI alleges that the QTA "does not provide a waiver of sovereign immunity" concerning Inyo County's relief concerning removal of obstructions. DOI Memo at 19-20 n.5. This argument presupposes that DOI will prevail on a defense that it might make later and with which this Court may or may not agree. However, "an application to intervene cannot be resolved by reference to the ultimate merits" of the litigation. *Brennan v. NYC Bd. Of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) (quotation & citation omitted). DOI's claim also ignores settled law that in evaluating a proposed-intervenors interests, one looks at the relief sought in the complaint. *See supra* at 8.

easement, "title" to an R.S. 2477 highway right-of-way is the right to use that property. *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 747 (10th Cir. 2005) ("*SUWA*") (right-of-way "is an entitlement to use certain land in a particular way.") Thus, the fundamental issue in which the Conservation Groups have an interest – whether the areas crossed by the alleged "highways" will be subject to degradation from motor vehicle use – is at stake in this litigation.

And while Inyo County now says it does not seek to define the scope of the rights-of-way to which it seeks title, court determination with respect to title to these rights-of-way necessarily involves defining the manner in which the County is entitled to use the property. Inyo Memo. at 3-4. It would seem impossible for this Court to state that Inyo County "owns" a particular R.S. 2477 right to use the land without defining the scope of those uses. *See SUWA*, 425 F.3d at 747 (defining an R.S. 2477 right-of-way entails more than establishing physical boundaries).

Further, while DOI cites cases establishing that the Park Service retains some authority to regulate use of valid rights-of-way, it does not deny that it may be unable to stop motor vehicles from using the alleged routes if a right-of-way is held to exist. DOI Memo. at 20 (failing to dispute that DOI may lose the full range of management options if Inyo County gains title to the routes). In fact, in 2006 DOI directed all its bureaus (including the National Park Service) to apply nationwide a new policy stating, *inter alia*, that an R.S. 2477 right-of-way holder may maintain and use its right-of-way without DOI approval or involvement: "The holder of an R.S. 2477 right-of-way across Federal land who wishes simply to conduct routine maintenance or to use the right-of-way in the same manner as it was used on October 21, 1976, or an earlier date of reservation may do so without consultation with the Department." Exh. 26 to Conservation Memo. at Attachment p. 5; *see also* Conservation Memo. at 24 (discussing DOI 2006 policy).[15] In a 1993 report to Congress, DOI also admitted that "[r]ecognition and use of R.S. 2477 rights-of-way could interfere with and prevent effective management of the individual and common objective of the affected [federal] agencies ...." Exh. 25 at 35. DOI concluded R.S. 2477 routes "could compromise the specific purposes and values

[15] The County has already shown it believes it can maintain these routes without DOI involvement; in 2004 it did just that on the disputed route in Greenwater Valley. *See* Conservation Memo. at Exhs. 16 & 18.

these areas [including National Parks] were established to protect." *Id*. at 36. Inyo County's QTA claims raise these precise concerns.[16]

In addition to determining whether DOI will have to tear down its barriers and allow motorized access to the alleged routes, this litigation could fundamentally alter the management regime under which the alleged routes are governed, as well as the public's ability to participate in management decisions. Indeed, Inyo County states that its suit aims to end DOI's unilateral control of the lands at issue within Death Valley National Park wilderness and replace it with a regime in which "management of the roads [will be] a cooperative enterprise between Inyo County and [DOI]." Inyo Memo. at 13. Currently, if DOI retains title, the CDPA and the Wilderness Act prevent DOI from permitting public motor vehicle use of the routes. *See* Conservation Memo. at 7-8 (citing statutes). If the County is found to possess highway rights-of-way, however, the Congressional directive prohibiting motor vehicle use might be rendered meaningless. *See SUWA*, 425 F.3d at 748-49 (county may maintain R.S. 2477 right-of-way without notifying federal landowner).[17]

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[16] DOI avers that if Inyo County wins a right-of-way, Conservation Groups' interests cannot be harmed because the United States has the right to compensate the County for the right-of-way. DOI Memo. at 15-16. That the United States has that right does not mean it will have the interest, the will, or the funds to exercise it. Nor does DOI assert it will definitely pay compensation if it loses this case. The National Park Service estimated in 1993 that there are "thousands of possible R.S. 2477 rights-of-way" on its lands in the West, making buy-outs of all of them unlikely. Exh. 24 to Conservation Memo. at numbered page 3. Conservation Groups need only show that this case "may as a practical matter impair or impede" their interests. Fed. R. Civ. P. 24(a)(2) (emphasis added).

[17] The County contends Conservation Groups' interests will not be harmed by this suit, and will be amply protected by later environmental review processes under federal and state laws, including the California Environmental Quality Act ("CEQA"). Inyo Memo. at 13-14. This argument fails for at least four reasons. First, the County states that "traditional uses" of the routes – which the County has asserted in its complaint include motor vehicle use – will be exempt from CEQA analysis. Inyo Memo. at 13; *see also* Complaint ¶¶ 58, 66, & 74 (identifying alleged rights-of-way in Greenwater and Last Chance Canyons as "motorized route[s]," and identifying the alleged right-of-way in Greenwater Valley as a "four-wheel drive" route). Thus, the County admits the very uses the Groups long sought to prevent would not be subject to CEQA analysis or trigger any public notice or provide a forum for public participation. Second, routine maintenance of roads and trails is also exempt from CEQA analysis, public notice and participation. California Code of Regulations § 15301(c) (categoricaly exempting from review "operation, repair, [and] maintenance" of "[e]xisting highways and streets … and similar facilities"). Third, the relief the County seeks in this case – removal of barriers and motorized use of the routes – will harm the Groups immediately. Fourth, federal courts have held that the availability of participation in later planning processes where lesser protection is likely cannot thwart intervention. *Utah Ass'n of Counties*, 255 F.3d at

This shift in regulatory authority from one under which DOI is barred from allowing vehicle use to one where it may be forced to allow such use – and its attendant substantive and procedural consequences – would harm the Conservation Groups' legally protected interests. *See Natural Res. Def. Council*, 578 F.2d at 1344 (allowing industry group to intervene because litigation could determine whether it would be subject to state or federal regulatory regime). Far from being "foreign to this action," DOI Memo. at 16, the management of Greenwater Canyon, Last Chance Canyon, and Greenwater Valley hangs in the balance in this case.[18]

C. DOI May Not Adequately Represent The Conservation Groups.

Rule 24(a)(2)'s final requirement "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*, 404 U.S. at 538 n.10 (emphasis added) (quotation omitted). Here, the Conservation Groups' interests differ significantly from DOI's. *See* Conservation Memo. at 23-26. Nonetheless, Inyo County and DOI contend the government will adequately represent the Conservation Groups' interests. Inyo Memo. at 15-17; DOI Memo. at 22-28. They are wrong.

1. The Defendant's Duty To Represent A Broad Range of Interests Precludes It From Adequately Representing The Conservation Groups' Focused Interests.

The Ninth Circuit holds that "[w]hen an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki*, 324 F.3d at 1086. This rebuttable presumption of adequate representation can be overcome, however, when the government is "required to represent a broader view than the narrow, parochial interests" of the proposed intervenor. *Forest Conservation Council*, 66 F.3d at 1499 (citing cases and holding the

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1254 ("'[W]here a proposed intervenor's interest will be prejudiced if it does not participate in the main action, the mere availability of alternative forums is not sufficient to justify denial of a motion to intervene.'" (quoting *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Serv.*, 736 F.2d 384, 387 (7th Cir. 1984)).

[18] That the Conservation Groups seek intervention to protect these areas does not mean they will attempt to litigate irrelevant management issues. DOI Memo. at 17-18; Inyo Memo. at 19. The parties confuse the Conservation Groups' interests with how the Groups will protect those interests in this case. The Conservation Groups moved to intervene because their interests could be injured by a determination that the County has highway rights-of-way through Death Valley National Park. If the Groups are allowed to intervene, they will work to protect their interests by demonstrating that no such rights-of-way exist.

"Forest Service is required to represent a broader view than the more narrow, parochial interests of" state and local governments); *see also Sw. Ctr. for Biological Diversity*, 268 F.3d at 823 (federal agencies may not adequately represent more narrow interests of private developers); *Sagebrush Rebellion*, 713 F.2d at 528 (DOI may not adequately represent conservation group that brought a different perspective to case).

DOI and Inyo County insist the government will adequately represent the Conservation Groups' interests because both DOI and the Groups share the same "ultimate objective" of defeating Inyo County's claims. DOI Memo. at 23-24; Inyo Memo. at 16. However, the Ninth Circuit's presumption of adequate representation is overcome here because of the Conservation Groups' narrow focus on preserving the wild character of the lands at risk. DOI is obligated to consider interests other than conservation, and these competing concerns may temper the federal government's willingness to aggressively defend its title to the disputed routes. Conservation Memo. at 25-26. For example, DOI must concern itself not just with preserving the ecological integrity of Death Valley National Park, it must also consider its obligation to maintain amicable relationships with the communities and local governments surrounding the Park. *See, e.g., id.* at 25 (noting Death Valley National Park's Plan instructs agency to cooperate with local governments). In contrast, the Conservation Groups are under no obligation to consider any interest other than their conservation objective, and thus are free to defend energetically the federal government's title to the alleged rights-of-way. Accordingly, cases like *Forest Conservation Council*, *Southwest Center for Biological Diversity*, and *Sagebrush Rebellion* are directly on point. Under this line of cases, the Conservation Groups have rebutted the presumption of adequate representation.

DOI asserts the aforementioned cases are distinguishable because they involve "administrative actions." DOI Memo. at 25. A QTA case is different from cases involving administrative action, DOI argues, because in a QTA case, the government "is not forced to choose between competing public interests, it simply defends its title." DOI Memo. at 27. If this Court accepts DOI's argument, it would effectively create a new rule – for which DOI provides no support – that applies different "adequate representation" standards to various categories of cases, depending on the nature of the underlying claims. There is no reason for this Court to fragment the law in such

a fashion. QTA cases are no different than cases in which the government is defending a rule, statute, or administrative action. In each, the government "simply defends" itself and faces a similar "all or nothing" proposition as the court decides whether to strike down or uphold the agency action. In balancing competing pressures in QTA cases, DOI may choose to defend vigorously its ownership through aggressive discovery and briefing. Or, it may decide for political or other reasons to forgo an aggressive approach and press only modest arguments concerning standards and burdens of proof. Or, it may settle cases in ways that effectively recognize rights-of-way. *See Carpenter*, 298 F.3d at 1124 (describing settlement of case involving QTA claims in which United States would "not contest" alleged R.S. 2477 right-of-way); *see also* Exh. 3, attached (final judgment adopting settlement in QTA case in *State of Alaska v. United States*, 3:05-cv-0073 (D. Ak. Jan. 10, 2007) at 2, in which United States agreed to treat alleged right-of-way "as if it were" an R.S. 2477 right-of-way in all respects, except as to width). These are exactly the sorts of options that the government has in every lawsuit challenging agency action.

2. The Difference Between Conservation Groups' And Defendant's Arguments Are More Than Mere Disagreement Over Litigation Strategy.

"[I]n determining whether rights are being adequately represented, it is appropriate to examine whether existing parties' interests are such that they will make all of the arguments the applicants would make." *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988) (finding inadequate representation where government and intervenor had same goal, but government would not make all legal claims intervenor would). Although DOI and Inyo County do not dispute that the Conservation Groups may raise different arguments than the government, they dismiss these differences as merely disagreement over "tactics" or "litigation strategy." Inyo Memo. at 16; DOI Memo. at 28. However, because the independent arguments Conservation Groups intend to raise go to the heart of issues central to this dispute, their approach to this case represents more than just a difference in litigation strategy.

When a proposed intervenor will make substantive arguments the existing parties may not pursue, the resulting difference is not a mere disagreement in litigation strategy, it signifies the existing parties do not adequately represent the applicant. For example, in *Central Valley Chrysler-*

Jeep, Inc. v. Witherspoon, the court held that although conservation groups shared the same "ultimate objective" as the defendant state agency, the presumption of adequate representation was rebutted because the groups would raise preemption and ripeness arguments the existing parties would not. No. CV-F-04-6663 REC/LJO, 2005 U.S. Dist. LEXIS 26536, at *20-*21 (E.D. Cal. Oct. 20, 2005) (order granting motions to intervene, holding the conservation groups' position constituted "more than a difference in litigation strategy"), attached as Exh. 4.

The lack of adequate representation is particularly apparent here because Conservation Groups' disagreement with DOI involves a fundamental split over the meaning and interpretation of R.S. 2477: whether mechanical construction is required to prove a right-of-way's validity. *See* Conservation Memo. at 24-25. The Groups' intend to argue that R.S. 2477 requires Inyo County to show that each of the three routes was mechanically constructed, an additional hurdle for the County to overcome to meet its burden of proof, and one that could affect the litigation's ultimate outcome. *Id*. In its opposition memo, DOI could have assured the Court that it would raise this argument; it pointedly failed to do so. DOI Memo. at 27-28. Far from being a "disagreement over litigation strategy," such as the dispute over the pace of litigation, this is a "substantive difference" between the Conservation Groups and DOI, demonstrating that DOI cannot adequately represent the Groups. *Compare Oregon*, 839 F.2d at 638; *Cent. Valley Chrysler-Jeep, Inc*., 2005 U.S. Dist. LEXIS 26536, at *21 *with League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir. 1997) (adequate representation found where applicants' inadequate representation argument asserted litigation was proceeding too slowly).

II. IN THE ALTERNATIVE, THE CONSERVATION GROUPS MEET THE TEST FOR PERMISSIVE INTERVENTION UNDER RULE 24(b).

Rule 24(b) states:

> Upon timely application anyone may be permitted to intervene in an action … when an applicant's claim or defense and the main action have a question of law or fact in common. … In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of rights of the original parties.

The standard for permissive intervention, unlike that for intervention of right under Rule 24(a), does not require the intervenor to have a direct interest in the subject of the litigation. *See SEC v. United*

States Realty & Improvement Co., 310 U.S. 434, 459 (1940); *Kootenai Tribe*, 313 F.3d at 1110 (upholding grant of permissive intervention where "intervenors do not have an independent protectable interest"); Wright, Miller & Kane, *Federal Practice and Procedure* § 1911 n.8 (2d ed. 1986).[19] The Ninth Circuit has previously upheld a grant of permissive intervention to conservation groups in a quiet title action where they sought to intervene on behalf of the United States, precedent both Inyo County and DOI ignore. *California ex rel. State Lands Comm'n,*, 805 F.2d at 860, 865-66.

A. Conservation Groups Assert Claims Or Defenses In Common With The Main Action.

Contrary to DOI's and the County's assertions, the Conservation Groups' claims and defenses clearly share common questions of law or fact with the main action as required by Rule 24(b). *See* DOI Memo. at 31-33; Inyo Memo. at 19. Conservation Groups intend to assert claims and defenses concerning the central question in this action: whether R.S. 2477 confers upon the County a right-of-way to which it may quiet title under the QTA. *See* Proposed Answer at 11-12, Conservation Memo. at 26-27. As DOI admits, Conservation Groups intend to raise defenses related to whether an R.S. 2477 right-of-way was properly established, and whether the QTA's statute of limitations has run, among others. DOI Memo. at 32. That is enough to meet the test of Rule 24(b).

DOI belittles these claims, however, stating that "those are defenses assertable by … the United States; they are not the Conservation Groups' claims or defenses." DOI Memo. at 32. DOI cites no caselaw for the proposition that a permissive intervenor's defenses must be unique to that party, and the Ninth Circuit has held to the contrary. *See, e.g., Kootenai Tribe,* 313 F.3d at 1110-14. In *Kootenai Tribe*, conservation groups were allowed to intervene permissively on the basis of defenses available to the government defendant. The Ninth Circuit stated: "though intervenors do not have a direct interest in the government rulemaking, … they assert 'defenses' of the government rulemaking that squarely respond to the challenges made by plaintiffs in the main action." *Id*. at

[19] DOI's assertion that Conservation Groups cannot merit permissive intervention because they "do not assert any property interest in the land in dispute" and Inyo County's similar allegations are thus baseless. *See* DOI Memo. at 32; Inyo Memo. at 18 (arguing Conservation Groups can state no common claim or defense because they "claim no ownership interest in the fee underlying those rights-of-way").

1110-11. Conservation Groups here intend to do the same. Moreover, if parties cannot permissively intervene based on defenses they could offer in common with a defendant, permissive intervention on the government's behalf would be impossible in the vast majority of administrative cases where the question is whether the government violated some legal duty peculiar to it. This Court should not adopt such a broad and novel rule.

B. Conservation Groups' Intervention Will Not Unduly Delay Or Prejudice This Court's Adjudication.

Inyo County alone, and without citation to any authority, asserts that the Conservation Groups' participation in this case will unduly delay or prejudice the outcome of the case. Inyo Memo. at 19. The County is wrong. The Ninth Circuit has held that where "intervention motions were filed near the case outset," and where "the defendant-intervenors said they could abide the court's briefing and procedural scheduling orders, there was no issue whatsoever of undue delay." *Kootenai Tribe*, 313 F.3d at 1111 n.10. Conservation Groups here moved to intervene before DOI had answered and can abide by this Court's briefing and scheduling orders. Inyo County's allegations that Conservation Groups seek to prolong this litigation for nefarious purposes are false and unsupported.

C. Conservation Groups Need Not Demonstrate An Independent Grounds for Jurisdiction.

The Ninth Circuit has held that applicants seeking permissive intervention must show that "the court has an independent basis for jurisdiction over the applicant's claims." *Donnelly*, 159 F.3d at 412. However, there is no indication courts should impose such a requirement on applicants who, like the Conservation Groups, seek to intervene as defendants and who raise no new claims or defenses. The "independent grounds" requirement simply precludes an intervenor from raising independent claims or defenses that fall outside the limited jurisdiction of a federal court.[20] *See Equal Employment Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046-47

[20] One treatise notes that the only situation requiring those seeking permissive intervention to demonstrate independent jurisdiction is where "jurisdiction in the original action was based on diversity of citizenship." Moore's Federal Practice, § 24.11 at n.1 (3rd ed. 1999) (emphasis added). This action is founded not on diversity, but on the federal questions presented here and the QTA's waiver of sovereign immunity.

(D.C. Cir. 1998) ("No less than the original claimants, a third party who seeks to intervene in a federal action and litigate a claim on the merits must demonstrate that the claim falls within the court's limited jurisdiction").

The cases relied upon by DOI in support of its "independent grounds" argument illustrate this concept. In *Blake v. Pallan*, the Ninth Circuit noted a potential permissive intervenor is required to establish an independent ground for jurisdiction "where the intervenor also seeks to add his own causes of action." 554 F.2d 947, 956 (9th Cir. 1977) (emphasis added). The court rejected the applicant's request for permissive intervention because the new claims the applicant sought to raise were state law claims over which the federal courts had no jurisdiction. *Id*. at 951, 955, 956. Similarly, the district court in *United States v. Lindstedt* denied permissive intervention when the applicant sought "to assert new causes of action," none of which were subject to the federal court's jurisdiction. 1995 WL 774520 at * 9 (D. Or. Dec. 4, 1995) (emphasis added) (*see* DOI Memo. at Attachment 5). In contrast to the proposed intervenors in *Blake* and *Lindstedt*, the Conservation Groups do not seek to add causes of action. Accordingly, they need not show independent grounds for jurisdiction. Furthermore, unlike the new causes of action in *Blake* and *Lindstedt*, the QTA claims the Conservation Groups seek to defend are federal questions undoubtedly subject to this Court's jurisdiction. *See* Wright, Miller & Kane, *Federal Practice and Procedure* § 1917 (2d ed. 1986) ("In federal question cases there should be no problem of jurisdiction with regard to an intervening defendant ....").

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CONCLUSION

For the reasons set forth above, this Court should grant the Conservation Groups' motion to intervene of right, or in the alternatively, permissively.[21]

DATED: April 19, 2007

Respectfully,

/s/ Edward B. Zukoski
EDWARD B. ZUKOSKI
JAMES S. ANGELL
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202
Telephone: (303) 623-9466

MICHAEL R. SHERWOOD
Earthjustice
426 17th Street, 5th Floor
Oakland, CA 94612
Tel: (510) 550-6725
Fax: (510) 550-6749

Attorneys for Proposed Defendant-Intervenors

/s/ Lisa T. Belenky (authorized 4/19/07)
LISA T. BELENKY
Center for Biological Diversity
1095 Market Street, Ste. 511
San Francisco, CA 94103
Tel: (415) 436-9682 x307

Attorney for Proposed Defendant-Intervenor
Center for Biological Diversity

[21] Inyo County suggests Conservation Groups should participate in this case as *amicus curiae*. Inyo Memo. at 17. A grant of *amicus curiae* is no substitute for party status. *See Forest Conservation Council*, 66 F.3d at 1498 (citing cases establishing that *amicus curiae* status is insufficient). This is particularly true here, since the County's claims will likely require a trial where the ability to introduce witnesses, conduct discovery, and cross-examine witnesses will be crucial.

TABLE OF EXHIBITS