EXHIBIT 2

Brief of the United States, *United States v. Carpenter*, No. 01-16326 (9th Cir. Dec. 10, 2001) (excerpts)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-16326

UNITED STATES OF AMERICA,
Plaintiff-counter-defendant-Appellee,

v.

JOHN C. CARPENTER, O.Q. JOHNSON, GRANT A. GERBER
Defendants,

COUNTY OF ELKO COUNTY, NEVADA
Defendant-counter-claimant-Appellee,

THE WILDERNESS SOCIETY AND
GREAT OLD BROADS FOR WILDERNESS,
Movants-Appellants.

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

No. CV-N-99-0547-DWH-RAM

BRIEF OF THE UNITED STATES

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– in addition to being speculative in nature – are insufficient to warrant intervention as of right in Elko County's counterclaim.

A. TWS's Interest Is Not Legally Protectable.

The "protectability" requirement bars intervention by groups that merely have a concern, but no legally protectable interest, in the litigation. The requirement was formulated by the Supreme Court in *Donaldson v. United States,* 400 U.S. 517 (1971), and elaborated – in the context of intervention by a public interest group – in *Portland Audubon v. Hodel,* 866 F.2d 302, 309 (9th Cir. 1989), and *Sierra Club*, 995 F.2d at 1482. In *Donaldson*, the Court held that a circus worker could not intervene in a proceeding in which the Internal Revenue Service sought to obtain documents from his employer. *See Sierra Club*, 995 F.2d at 1482 (citations omitted). Although the circus worker had an interest in the documents that related to his employment, his was not a "protectable interest" because "the records were not his, and he had no proprietary right, [...] constitutional claim to suppression, or other right to interfere with the circus's disclosure to the IRS." *Id.* Relying on *Donaldson,* this Court in *Portland Audubon* held that logging advocacy groups lacked a protectable interest to intervene as defendant in a NEPA action brought by environmental groups to enjoin proposed timber sales. Only the

government could be a defendant in the NEPA claim, the Court held. *See Portland Audubon*, 866 F.2d at 309.

TWS does not have a protectable right to question the United States' decision not to contest Elko County's claim that the South Canyon Road is an R.S. 2477 right of way. This claim is asserted under the Quiet Title Act, 28 U.S.C. § 2409a, the exclusive means by which to challenge title of the United States to real property. *See Block v. North Dakota*, 461 U.S. 273, 286 (1983). The Quiet Title Act provides a limited waiver of the United States' sovereign immunity from suit, authorizing a suit to adjudicate competing property right claims in real property in which the United States claims an interest. *Id.* at 275-76. It does not authorize participation by any entity that does not assert a property interest in the subject property. An entity without a property interest has no place in a dispute to determine ownership of that property. TWS claims no property interest in the South Canyon Road, and, therefore, cannot intervene in Elko County's quiet title counterclaim. The Quiet Title Act authorizes only a suit to determine competing property interests, not generalized interests in how property might be used. Nor does the Quiet Title Act authorize citizens to step into the government's shoes in order to assert claims on behalf of the government. Further, the Quiet Title Act provides that the United States may disclaim its interest in the claimed real

property or interest, 28 U.S.C. § 2409a(e), and makes no provision for public involvement in the United States' decision whether or not to disclaim an interest. Accordingly, TWS has no protectable right to second-guess the United States' decision in this case to settle its title dispute with Elko County.

B. TWS's Interest, Even If Protectable, Does Not Relate to the Litigation.

Even if a party without a property interest could intervene in a suit to adjudicate title to property, TWS does not have an interest in intervention based on "environmental consequences" because that interest does not relate to Elko County's quiet title counterclaim. *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) ("NFRC").

The negative environmental impacts that TWS predicts are entirely speculative, a point that is evident from TWS's own rhetoric. TWS Br. 43. Though it argues that the United States has impaired its interests, TWS does not allege that the United States has violated any law or regulation by agreeing to "not contest" the existence of an R.S. 2477 right of way. Rather, TWS conjectures that Elko County "will argue" that it need not obtain federal authorization to take certain actions on the road, and that the United States, despite case law supporting

CONCLUSION

Wherefore, for all the foregoing reasons, the United States respectfully requests that this Court affirm the district court's Order denying TWS's Motion to Intervene.

DATED this 10th day of December, 2001.

Respectfully submitted,

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