Volume 27 | Issue 2 Article 2

8-1-2016

# Shhh: Eighth Circuit Puts Conservationists Intervenor to Bed in Quiet Title Action in North Dakota ex rel. Stenehjem v. United States

Matthew K. Arnold

# SHHH: EIGHTH CIRCUIT PUTS CONSERVATIONISTS INTERVENOR TO BED IN QUIET TITLE ACTION IN *NORTH DAKOTA EX REL. STENEHJEM V. UNITED STATES*

## I. Getting Ready for Bed: Introduction to Article III Standing and Intervention in Quiet Title Actions

In order to bring an action in federal court, original parties in the litigation must have Article III standing.[1] Nonetheless, federal courts have not fully determined whether this rule applies to prospective intervenors invoking Federal Rules of Civil Procedure 24(a) and 24(b).[2] As a result, this uncertainty has created a circuit split as to whether Article III standing is a requirement for intervention.[3] A majority of the circuits have held that a case is sufficient as long as at least one party has standing in the case.[4] A minority of the circuits, however, require Article III standing to be prerequisite to intervention, and, therefore, every party in the litigation must have standing in order to be a case or controversy.[5] Pursuant to this requirement, the intervenor must demonstrate a "direct, substantial, and legally protectable" interest, also known as the DSL Test.[6] Specifically, the Eighth Circuit has stated that "an Article III case or controversy, once joined by intervenors who lack standing, is . . . no longer an Article III case or controversy."[7] In *North Dakota*

1. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 555 (1992) (discussing requirements to sue in federal court).

2. *See* Cynthia K. Timms & Kirsten M. Castañeda, *You Say Yes, I Say No: Federal Circuit Splits that Impact Texas Lawyers*, 22 App. Advoc. 423, 424 (2010) (discussing circuit split on whether standing is required for intervention); *see also* Juliet Johnson Karastelev, Note, *On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 Duke L.J. 455, 459 (2002) (discussing circuit split).

3. *See* Timms & Castañeda, *supra* note 2, at 424, 434 (discussing circuit split); *see also* Elizabeth Zwickert Timmermans, Note, *Has the Bowsher Doctrine Solved the Debate?: The Relationship Between Standing and Intervention as of Right*, 84 Notre Dame L. Rev. 1411, 1428 (2009) (showing basis of circuit split).

4. *See* Timmermans & Castañeda, *supra* note 2, at 1432 (citing Ruiz v. Estelle, 161 F.3d 814, 832 (5th Cir. 1998)) ("Article III standing . . . does not require each and every party in a case to have such standing.").

5. *See id.* at 1429 (explaining minority's view on standing and intervention).

6. *Id.* (internal quotation marks omitted) (explaining DSL test); *see also* San Juan Cnty., Utah v. United States, 503 F.3d 1163, 1197-98 (10th Cir. 2007) (en banc) (rejecting DSL test).

7. Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996) (refusing to recognize intervenors without Article III standing).

*ex rel. Stenehjem v. United States*,[8] the Eighth Circuit extended its precedent by applying this standard to quiet title actions.[9]

Whether Article III standing is required for intervention has often been litigated in the lower courts, but it has rarely been addressed in regards to the Quiet Title Act of 1972.[10] Apart from *North Dakota ex rel. Stenehjem*, the United States District Court for the District of North Dakota cited only one other case addressing intervention in a quiet title action.[11] Intervention in quiet title actions creates a question of whether the intervenor must demonstrate an interest *in* the property or *in relation to* the property.[12] If the interest merely needs to be *in relation to* the property, courts would permit more intervention.[13] This would directly increase the influence of conservation groups in quiet title litigation.[14] Contrarily, if the interest must be *in* the property, then conservation groups would have a much tougher obstacle to overcome in order to be involved in the litigation.[15] This would reduce the potential influence of conservation groups in quiet title actions.[16]

This Note analyzes whether the Eighth Circuit correctly determined that a potential intervenor in a quiet title action must have standing and an interest *in* the property rather than an interest *in relation to* the property.[17] Part II of this Note discusses the facts in *North Dakota ex rel. Stenehjem*.[18] Part III of this Note discusses the

---

8. 787 F.3d 918 (8th Cir. 2015).

9. *See id.* at 920 (focusing on issue of intervention and standing).

10. *See* North Dakota v. United States, No. 1:12-cv-125, at *8 (D.N.D. Feb. 4, 2014) (Bloomberg) (discussing scant amount of case law addressing intervention in Quiet Title Action). For more information on the Quiet Title Act, see *infra* notes 50-55 and accompanying text.

11. *See North Dakota*, No. 1:12-cv-125 at *8 (Bloomberg) (discussing lack of case law on this issue). There has been one other case from the United States District Court for the Eastern District of California that discusses this issue. *See generally* Hazel Green Ranch, LLC v. U.S. Dep't of Interior, No. 1:07-CV-00414 OWW SMS, 2008 WL 2876194, at *1 (E.D. Cal. July 24, 2008). For a more in-depth discussion of *Hazel Green Ranch*, see *infra* notes 128-137 and accompanying text.

12. *See San Juan Cnty.*, 503 F.3d at 1199 (stating that interest is recognized since it relates to property); *see also North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (stating interest is not recognized if only relates to property).

13. *See San Juan Cnty.*, 503 F.3d at 1199 (discussing interests protectable in quiet title actions).

14. *See id.* (discussing interests protectable in quiet title actions).

15. *See North Dakota*, No. 1:12-cv-125, at *10 (Bloomberg) (discussing how Conservation Groups do not have interest in property).

16. *North Dakota ex rel. Stenehjem*, 787 F.3d at 923 (focusing on issue of standing and intervention).

17. *See id.* (focusing on issue of standing and intervention).

18. For a further discussion of the facts in *North Dakota ex rel. Stenehjem*, see *infra* notes 23-42 and accompanying text.

background of Article III standing and Rule 24(a), intervention as of right, and Rule 24(b), permissive intervention, as well as Eighth Circuit precedent on this issue.[19] Part IV provides a narrative analysis on the Eighth Circuit's opinion.[20] Part V critically discusses the Eighth Circuit's analysis, and examines the potential mistakes the Eighth Circuit may have made in its opinion.[21] Lastly, Part VI of this Note discusses the impact that *North Dakota ex rel. Stenehjem* may have on the Eighth Circuit and other circuits, considering the circuit split on standing and intervention.[22]

## II. BRUSH YOUR TEETH: DISCUSSION OF THE FACTS IN *NORTH DAKOTA EX REL. STENEHJEM*

In *North Dakota v. United States*,[23] three conservation groups (Conservation Groups) filed a motion to intervene in a quiet title action between North Dakota and the United States in the District Court of North Dakota.[24] The state of North Dakota, as well as four counties in North Dakota, sought quiet title from the federal government under the Quiet Title Act of 1972.[25] The counties collectively filed two separate claims, which were consolidated by the court on April 16, 2013, with *North Dakota* considered the primary case.[26]

The dispute arose out of section line easements on land managed by the United States Forest Service in the Prairie Grasslands in western North Dakota.[27] The counties claimed possession to the section line easements, which would allow the counties to obtain possession of land thirty-three feet on either side of the section

19. For a further discussion of the background of standing and intervention, see *infra* notes 43-137 and accompanying text.

20. For a further discussion of the Eighth Circuit's analysis, see *infra* notes 138-163 and accompanying text.

21. For a further critique of the Eighth Circuit's opinion, see *infra* notes 164-209 and accompanying text.

22. For a further discussion of the potential impact of *North Dakota ex rel. Stenehjem*, see *infra* notes 210-229 and accompanying text.

23. No. 1:12-cv-125, at *1 (D.N.D. Feb. 4, 2014) (Bloomberg).

24. *See id.* (discussing procedure and background of case). The potential intervenors were "the Badlands Conservation Alliance, Sierra Club, and National Parks Conservation Association." *See id.*

25. *See* 28 U.S.C § 2409a (2012) (describing Quiet Title Act of 1972); *see also North Dakota*, No. 1:12-cv-125, at *2 (Bloomberg) (describing background of case). Plaintiff counties were Billings County, Golden Valley County, McKenzie County, and Slope County. *Id.* at *3 (describing plaintiff counties).

26. *See North Dakota*, No. 1:12-cv-125, at *1 (Bloomberg) (describing procedure of case).

27. *See id.* (explaining origin of dispute).

line.[28] The United States refuted this claim and did not recognize the section line easements.[29] In claiming possession of the easements, Plaintiffs stated that the roads were public roads established before the United States reacquired the land under the Bankhead-Jones Farm Tenant Act of 1937, and therefore, the easements were in the counties' possession.[30] Additionally, McKenzie County asserted title to the six roads in contention before the United States reacquired the land.[31]

The Conservation Groups sought to intervene as a matter of right, pursuant to Federal Rule of Civil Procedure 24(a), and through permissive intervention, pursuant to Federal Rule of Civil Procedure 24(b).[32] The Groups sought to intervene because they believed that their environmental and aesthetic interests in the Prairie Grasslands were not adequately represented by the United States in the litigation.[33] Specifically, the Conservation Groups claimed that their specific interests were often at odds with the broad interests of the United States.[34] North Dakota, the counties, and the United States objected to the Conservation Groups' intervention.[35]

Adopting the concurring opinion in *San Juan County, Utah v. United States*,[36] the United States District Court for the District of North Dakota denied the Conservation Groups' motion to intervene.[37] The court's reasoning centered on the notion that the Conservation Groups' interest was not *in* the title of the property and

---

28. *See id.* at *2-3 (describing specifics of dispute).

29. *See id.* (describing Defendant's argument).

30. *See id.* at *3 (describing Plaintiff's argument in quiet title action).

31. *See North Dakota*, No. 1:12-cv-125, at *3 (Bloomberg) (specifying McKenzie County's argument).

32. *See id.* (describing procedural rules allowing for intervention); *see also* FED. R. CIV. P. 24(a)-(b) (stating rules for intervention in federal actions).

33. *See North Dakota*, No. 1:12-cv-125, at *3 (Bloomberg) (describing reason for Conservation Groups' intervention).

34. *See id.* (explaining why United States cannot adequately represent Conservation Groups).

35. *See id.* at *1 (demonstrating Plaintiffs' and Defendant's opposition to intervention). The United States did not object to permissive intervention under Rule 24(b) "provided certain conditions [were] imposed." *Id.* at *12; *see also* FED. R. CIV. P. 24(b) (explaining requirements for permissive intervention). An example of these conditions can be seen in the case of *Hazel Green Ranch. See generally* Hazel Green Ranch, LLC v. U.S. Dep't of Interior, No. 1:07-CV-00414-OWW-SMS, 2007 WL 2580570 (E.D. Cal. Sept.5, 2007). For a further discussion of *Hazel Green Ranch*, see *infra* notes 128-137 and accompanying text.

36. 503 F.3d 1163 (10th Cir. 2007) (en banc).

37. *See North Dakota*, No. 1:12-cv-125, at *12 (Bloomberg) (denying Conservation Groups' standing).

was protected by the United States.[38] The Conservation Groups, therefore, lacked the requisite Article III standing to intervene under Federal Rules of Civil Procedure 24(a) and 24(b).[39] Additionally, the court held that the Conservation Groups could not overcome the increased intervention hurdle of *parens patriae*, which placed the burden of demonstrating a legally protectable interest on the intervenor because the proposed co-defendant was the United States.[40] The Conservation Groups appealed the District Court's decision to the Eighth Circuit Court of Appeals.[41] The focus of this Note is the Conservation Groups' appeal, and the Eighth Circuit's subsequent affirmation.[42]

## III. STORY TIME: BACKGROUND ON ARTICLE III STANDING FOR CONSERVATION GROUPS AND INTERVENTION IN QUIET TITLE ACTIONS

This Section seeks to explain the background on both Article III standing and intervention in quiet title actions.[43] Part A discusses the history of the Quiet Title Act of 1972 and defines pre-

38. *See id.* at *8, *9, *11-12 (stating why Conservation Groups were denied intervention); *see also* North Dakota ex rel. Stenehjem v. United States, 787 F.3d 918, 920 (8th Cir. 2015) (discussing District Court's holding). In *San Juan County*, the concurring opinion rejected the majority's opinion, which stated that a potential intervenor must only have an interest *in relation to* the property. San Juan Cnty. v. United States, 503 F.3d 1163, 1208 (10th Cir. 2007) (en banc) (quoting FED. R. CIV. P. 24(a)). Rather, the concurrence stated that there must be an interest *in* the property. *Id.* For a further analysis of *San Juan County*, see *infra* notes 100-110 and accompanying text.

39. *See North Dakota*, No. 1:12-cv-125, at *12 (Bloomberg) (discussing reasoning for denying Conservation Groups' intervention); *see also* FED. R. CIV. P. 24(a)-(b) (stating rules for intervention in federal action). The Eighth Circuit Court of Appeals adopted standing as a prerequisite for intervention. *See* Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996). The Eighth Circuit is the appellate court for the District Court of North Dakota, and therefore sets the district court's precedent. *See North Dakota*, No. 1:12-cv-125, at *8 (Bloomberg).

40. *See North Dakota*, No. 1:12-cv-125, at *11 (Bloomberg) (explaining doctrine of *parens patriae*); *see also North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (discussing *parens patriae*). The Eighth Circuit held that "conservation interests *are* concerns that the Government, as *parens patriae*, is charged with protecting, and that the presumption of adequate representation therefore applies." *Mausolf*, 85 F.3d at 1303. This can be specifically applied when a "would-be intervenor seeks to advance environmental and aesthetic interests." *North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (citing *Mausolf*, 85 F.3d at 1303).

41. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 920 (discussing Conservation Groups' appeal to Eighth Circuit).

42. *See id.* (affirming United States District Court for District of North Dakota's dismissal).

43. For a discussion of the background of standing and intervention, see *infra* notes 43-137 and accompanying text.

scriptive easements.[44] Part B presents a brief history of environmental standing, specifically discussing the Supreme Court's decisions in *Sierra Club v. Morton*[45] and *Lujan v. Defenders of Wildlife*.[46] Part C discusses the elements for intervention as of right and permissive intervention under Rule 24 of the Federal Rule of Civil Procedure.[47] Part D discusses the circuit split regarding whether Article III standing is a prerequisite to intervention, with a focus on the Eighth Circuit's opinion.[48] Finally, Part E discusses the specific issue in this Note, standing and intervention in quiet title actions.[49]

## A. Quiet Title Act and Prescriptive Easements

In 1972, the United States passed the Federal Quiet Title Act, which allows plaintiffs to challenge the United States government over a claim of title.[50] This action can only be commenced by a tenant or co-tenant owning an undivided interest in lands, where the United States is one such tenants in common or joint tenants, against the United States alone or against the United States and any other of such owners, shall proceed, and be determined, in the same manner as would a similar action between private persons.[51]

The Quiet Title Act is the only method through which owners who are adverse to the United States can challenge title over property.[52] Further, through the Quiet Title Act, claimants may obtain a prescriptive easement over real property owned by the United States.[53] As in the context of *North Dakota ex rel. Stenehjem*, a prescriptive easement describes the right to use property in a specific

---

44. For a discussion of the history of the Quiet Title Act of 1972 and prescriptive easements, see *infra* notes 50-55 and accompanying text.

45. 405 U.S. 727 (1972).

46. 504 U.S. 555 (1992).

47. For a discussion of the elements for both intervention as a right, and permissive intervention, see *infra* notes 66-75 and accompanying text.

48. For a discussion of the circuit split regarding standing and intervention, see *infra* notes 76-110 and accompanying text.

49. For a discussion of standing and intervention in quiet title actions, see *infra* notes 111-137 and accompanying text.

50. *See* Lonnie E. Griffith, *Federal Quiet Title Act*, 74 C.J.S. QUIETING TITLE § 100 (2015) (discussing history of Quiet Title Act).

51. 28 U.S.C. § 2409 (2012) (providing context for who may sue under Quiet Title Act).

52. *See* Sonja Larsen, *Claims Concerning Federal Lands; the Quiet Title Act*, 65 AM. JUR. 2D QUIETING TITLE § 85 (2016) (providing background on Quiet Title Act).

53. *See id.* (discussing Act's exclusive means for parties to obtain prescriptive easements).

manner.[54] The Quiet Title Act is the central method used by states and individuals to obtain title and easements over property the United States claims to own.[55]

## B. Brief History of Environmental Standing

The Supreme Court's reasoning in *Sierra Club* shifted the conservation groups' strategy to try to acquire Article III standing.[56] In *Sierra Club*, a conservation group sued developers in northern California, who wished to build a ski resort in Sequoia National Forest.[57] The group relied on acquiring standing as a non-profit corporation, rather than representing its members' individual interests.[58] Although the majority ruled against Sierra Club's standing, the Supreme Court of the United States recognized that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients [to] the quality of life in our society . . . [and are not] less deserving of legal protection through the judicial process."[59] In order to demonstrate this harm, the Court required individuals to show specific aesthetic or environmental injuries.[60]

Next, in *Lujan*, conservation groups challenged a rule that limited the Endangered Species Act to the geographic scope of the United States and the high seas.[61] In denying the conservation

54. *See* Daniel J. Smith, 2 AM. JUR. PROOF OF FACTS 3D *Burden of Proof and Presumptions* § 3 (1988) (defining prescriptive easement). The elements that must be fulfilled to obtain a prescriptive easement are the use of property that was actual, continuous, uninterrupted, and adverse for a set period of time. *See id.* (citing Rogers v. United States, 107 Fed. Cl. 387 (2012)).

55. *See* North Dakota ex rel Stenehjem v. United States, 787 F.3d 918, 920 (8th Cir. 2015) (describing procedure by which plaintiffs are suing); North Dakota v. United States, No. 1:12-cv-125, at *2-3 (D.N.D. Feb. 4, 2014) (Bloomberg) (same). *See generally* San Juan Cnty. v. United States, 503 F.3d 1163 (10th Cir. 2007) (en banc) (describing procedure); Friends of Panamint Valley v. Kempthorne, 499 F. Supp. 2d 1165 (E.D. Cal. 2007) (same); Hazel Green Ranch, LLC v. U.S. Dep't of Interior, No. 1:07-CV-00414-OWW-SMS, 2007 WL 2580570 (E.D. Cal. Sept. 5, 2007).

56. *See Sierra Club*, 405 U.S. at 740-41 (discussing history of case); *see also* Karl S. Coplan, *Direct Environmental Standing for Chartered Conservation Corporations*, 12 DUKE ENVTL. L. & POL'Y F. 183, 186 (2001) (providing reasoning for holding against group standing in *Sierra Club*).

57. *See Sierra Club*, 405 U.S. at 729-30 (detailing facts of case).

58. *See* Coplan, *supra* note 56, at 186 (discussing environmental groups' shift).

59. *Sierra Club*, 405 U.S. at 740 (paving way for environmental groups to obtain standing); *see also* Coplan, *supra* note 56, at 188 (discussing effect of *Sierra Club*'s opinion).

60. *See Sierra Club*, 405 U.S. at 740 (requiring party to be specifically injured by these harms); *see also* Coplan, *supra* note 56, at 188 (discussing requisite injury).

61. *See Lujan*, 504 U.S. at 555 (describing facts of case). Section 7(a)(2) of the Endangered Species Act requires each federal agency to consult with either the

groups' standing, the Supreme Court of the United States further narrowed the requirement of individual harm.[62] Since the plaintiffs could not demonstrate plans to visit the affected property, the Court denied the conservation groups' motion to intervene.[63] In its holding, the Court distinctly prescribed the required elements for Article III standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protectable interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . [t]he result [of] the independent action of some third party not before the court.' Third, it must be likely, as opposed to merely 'speculative,' that the injury be 'redressed by a favorable decision.'[64]

The elements above are considered the minimum requirements for conservation groups to obtain standing in federal court.[65]

### C. Intervention Under Rule 24 of the Federal Rules of Civil Procedure

Rule 24 of the Federal Rules of Civil Procedure allows parties to intervene to protect their interest in the property or transaction that is the subject of the litigation.[66] Intervention, ideally, leads to more efficient and equitable results arising from combining potential litigants.[67] The primary purpose of intervention is to protect third parties from potential litigation and judgments that may be adverse to their interest.[68] If one of the parties in the litigation,

---

Secretary of the Interior or the Secretary of Commerce to ensure that any action "is not likely to jeopardize the continued existence or habitat of any endangered or threatened species." *Id.*

62. *See id.* at 606 (denying standing for conservation groups).

63. *See id.* (describing lack of standing); *see also* Coplan *supra* note 56, at 195 (discussing *Lujan*'s importance).

64. *See Lujan*, 504 U.S. at 561 (internal citations omitted) (describing elements for Article III standing).

65. *See* Timmermans, *supra* note 3, at 1417 (discussing standing requirements as established in *Lujan*); *see also* Karastelev, *supra* note 2, at 459 (arguing ban on generalized grievances is constitutional mandate).

66. *See* Karastelev, *supra* note 2, at 460-61 (explaining Rule 24's purpose); *see also* FED. R. CIV. P. 24(a) (describing rule for intervention).

67. *See* Karastelev, *supra* note 2, at 464 (describing Rule 24's objectives).

68. *See* Timmermans, *supra* note 3, at 1414 (discussing Rule 24's intent).

however, can adequately represent the potential intervenor's interest, then the court may deny the motion for intervention.[69]

In order to intervene as a matter of right under Rule 24(a), the Eighth Circuit has set forth a three-part test that a party must meet:

> 1) [T]he party must have a recognized interest in the subject matter of the litigation; 2) that interest must be one that might be impaired by the disposition of the litigation; and 3) the interest must not be adequately protected by the existing parties. A recognized interest is one that is direct, substantial, and legally protectable.[70]

In short, as discussed in Section I, the Eighth Circuit requires a potential intervenor to pass the DSL Test.[71]

In order to acquire permissive intervention, a third party must be "given a conditional right to intervene by a federal statute or ha[ve] a claim or defense that shares with the main action of a common question of law or fact."[72] Additionally, the court must give consideration to delays or prejudices that may occur if the intervenor were to be granted permissive intervention.[73] Even if a potential intervenor has met these requirements, courts have discretion regarding whether to permit intervention.[74] Although the rules for intervention seem straightforward, determining when

---

69. *See North Dakota*, No. 1:12-cv-125, at *7-8 (Bloomberg) (discussing Rule 24(a)).

70. *See id.* (citing FED. R. CIV. P. 24 (a)).

71. *See id.* (discussing DSL Test); *see also San Juan Cnty.*, 503 F.3d at 1197-98 (discussing Eighth Circuit's adoption of DSL Test); United States v. Union Elec. Co., 64 F.3d 1152, 1161 (8th Cir. 1996) (same); Planned Parenthood of Minnesota, Inc. v. Citizens of Cmty. Action, 558 F.2d 861, 869 (8th Cir. 1977) (same); SEC v. Flight Transp. Corp., 699 F.2d 943, 948 (8th Cir. 1983) (same). The Eighth Circuit further narrowed the standard for adequate representation, stating that where a government "would be shirking its duty were it to advance th[e] narrower interest at the expense of its representation of the general public" the government is not adequately representing the prospective intervenor's interest. *Id.; see also* Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1000 (8th Cir. 1993) (quoting Dimond v. District of Columbia, 792 F.2d 179, 192-92 (D.C. 1986)) (discussing application of *parens patriae*).

72. *See North Dakota*, No. 1:12-cv-125, at *12 (Bloomberg) (citing FED. R. CIV. P. 24(b)) (discussing requirements for permissive intervention).

73. *See id.* (citing FED. R. CIV. P. 24(b)(3)) (showing court's consideration requirement).

74. *See* Didcuk v. Kaszycki & Sons Contractors, 149 F.R.D. 55, 59 (S.D.N.Y. 1993) (describing court's discretion in granting intervention); *see also* FED. R. CIV. P. 24(b) (explaining court's discretion in permissive intervention).

a potential intervenor is allowed to intervene is a divisive and unsettled matter in the higher courts.[75]

## D. The Circuit Split

The Supreme Court has been clear that parties must have standing to sue in federal court; there is, however, a contentious issue between the circuits as to whether standing is a prerequisite to intervention.[76] The Seventh Circuit, Eighth Circuit, and D.C. Circuits have concluded that intervention is permitted only when the intervenor has satisfied the Article III standing requirements.[77] Contrarily, the Second, Sixth, Tenth, and Eleventh Circuits have concluded that standing is not a prerequisite to intervention.[78] Specifically, the Tenth Circuit's *en banc* holding in *San Juan County* directly opposed and modified the Eighth Circuit's requirement for Article III standing.[79] The discussion by the Tenth Circuit in *San Juan County* has further created a rift between the Circuits regarding when to allow intervention.[80]

### *1. Eighth Circuit's Adoption of Standing as a Prerequisite to Intervention*

In *Mausolf v. Babbitt*,[81] the Eighth Circuit first addressed whether standing is a prerequisite for intervention.[82] In *Mausolf*, a coalition of conservation groups moved to intervene in an action brought by snowmobilers to end restrictions on snowmobiling in a

75. *See* Timmermans, *supra* note 3 (discussing circuit split regarding intervention); *see also* Karastelev, *supra* note 2 (demonstrating circuit split); Timms & Castañeda, *supra* note 2, at 434 (same); *San Juan Cnty.*, 503 F.3d at 1196-98 (same).

76. *See* Timmermans, *supra* note 3, at 1424 (discussing Supreme Court's silence regarding intervention and standing); *see also* Karastelev, *supra* note 2, at 464 (discussing intervention and circuit split); Timms & Castañeda, *supra* note 2, at 434 (same).

77. *See* Timms & Castañeda, *supra* note 2, at 435 (discussing Eighth Circuit's requirement for Article III standing); *see also* Timmermans, *supra* note 3, at 1429 (discussing standing requirement for intervention).

78. *See* Timms & Castañeda, *supra* note 2, at 435 (discussing other circuits' adoption of standing separate from intervention); *see also* Timmermans, *supra* note 3, at 1431-35 (discussing standing not as prerequisite for intervention).

79. *See San Juan Cnty*, 503 F.3d at 1197-99 (rejecting Eighth Circuit's requirement for standing).

80. *See id.* (discussing Eighth Circuit's requirement for standing); *see also* Timms & Castañeda, *supra* note 2, at 435 (discussing distinct difference in circuits); Timmermans, *supra* note 3, at 1434-35 (discussing *San Juan County*'s effect).

81. 85 F.3d 1295 (8th Cir. 1996).

82. *See generally id.* (establishing Eighth Circuit's precedent for standing and intervention).

national park.[83] Adopting the elements of standing articulated by the Supreme Court in *Lujan*, the Eighth Circuit discussed whether standing was a prerequisite for intervention under Rule 24(a).[84] In rejecting the argument that Rule 24 does not require standing, the court stated that "an Article III case or controversy, once joined by intervenors who lack standing, is [sic] no longer an Article III case or controversy."[85] Notably, the Eighth Circuit cited its earlier opinion in *Sierra Club v. Robertson*[86] to find that the conservation groups had standing to intervene.[87] The Eighth Circuit also relied on *Sierra Club v. Morton*, in which the Supreme Court held that "complaints of environmental and aesthetic harms are sufficient to lay the basis for standing."[88] Thus, in finding that the harms to the conservation groups in *Mausolf* were imminent and direct, the court permitted standing.[89]

Following the precedent set in *Mausolf*, in *Chiglo v. City of Preston*,[90] the Eighth Circuit further defined the interest required for intervention.[91] In *Chiglo*, the municipality of Preston, Minnesota banned tobacco advertising.[92] Binh Chiglo, a merchant affected by the restrictions, sued the city, and the court granted summary judgment in his favor.[93] A group of citizens motioned to intervene, claiming that the city had failed to protect their interests by not appealing the grant of summary judgment.[94] In rejecting the interests of the intervenors, the court stated that "the proposed intervenor cannot rebut the presumption of representation by merely disagreeing with the litigation strategy or objectives of the party representing him."[95] The *Chiglo* court mandated that intervenors must

83. *See id.* at 1297-98 (discussing history of case).

84. *See Lujan*, 504 U.S. at 560-61 (explaining framework for decision); *see also Mausolf* 85 F.3d at 1299 (citing *Lujan*'s elements for standing).

85. *Mausolf*, 85 F.3d at 1300 (rejecting Rule 24's ability to not require standing). In addition to intervention as a matter of right, the court included permissive intervention in this proclamation. *See id.*; *see also North Dakota*, No. 1:12-cv-125, at *12 (Bloomberg) (discussing *Mausolf*'s impact on permissive intervention).

86. 28 F.3d 753 (8th Cir. 1994).

87. *See Mausolf*, 85 F.3d at 1301 (discussing decision in *Sierra Club*).

88. *Sierra Club*, 405 U.S. at 758 (discussing acceptable interests for standing).

89. *See Mausolf*, 85 F.3d at 1301-02 (explaining interests of conservation groups).

90. 104 F.3d 185 (8th Cir. 1997).

91. *See generally id.* (defining further interest by Eighth Circuit).

92. *See id.* at 186-87 (discussing factual history of case).

93. *See id.* at 187 (describing factual posture of case).

94. *See id.* (detailing reason for intervention).

95. *Chiglo*, 104 F.3d at 188 (elaborating on reasoning behind rejecting intervention). The court also addressed the adequate representation of Preston under

show a specified interest that was not already represented in the litigation in order to acquire standing.[96]

Thus, *Mausolf*, and subsequently *Chiglo*, have proved to be two of the more divisive cases regarding intervention and standing.[97] As a result of the Eighth Circuit's reasoning in *Mausolf*, the Eighth Circuit is considered the leading circuit regarding standing as a prerequisite to intervention.[98] Although the Eighth Circuit is vocal and concrete about the requirements for standing, most other circuits vehemently reject this notion.[99]

*2. Tenth Circuit's Rejection of Standing as a Prerequisite*

The Second, Fifth, Sixth, Tenth, and Eleventh Circuits have all concluded that standing is not a prerequisite to intervention.[100] Since there is scant case law on this issue, however, only the Tenth Circuit has explicitly stated that standing is not a requirement for intervention in quiet title actions.[101] Through its *en banc* decision in *San Juan County*, the Tenth Circuit emerged as the leader for the majority viewpoint that standing is not required for intervention.[102]

In *San Juan County*, the *en banc* panel determined that the conservation groups did not have standing because the United States already represented their interests.[103] Although the Tenth Circuit denied the conservation groups standing, the Tenth Circuit rejected the Eighth Circuit's approach to intervention.[104] Specifically, the Tenth Circuit rejected the DSL Test required by the

*parens patriae*, stating that plaintiff did not commit "misfeasance or nonfeasance" by not appealing. *Id.*

96. *See* id. at 187-88 (creating specific interest test for intervention).

97. *See* Karastelev, *supra* note 2, at 469-70 (discussing *Mausolf*'s impact).

98. *See id.* (discussing Eighth Circuit's current legal status); *see also* Timms & Castañeda, *supra* note 2, at 435 (discussing impact of Eighth Circuit on intervention doctrine).

99. *See* Timms & Castañeda, *supra* note 2, at 435 (discussing Eighth Circuit's adoption of standing as prerequisite to intervention).

100. *See id.* (discussing Eighth Circuit's view on intervention).

101. *See San Juan Cnty.*, 503 F.3d at 1200-01 (discussing Tenth Circuit's view on standing and intervention in quiet title actions).

102. *See generally* Timms & Castañeda, *supra* note 2 (discussing *San Juan County*'s impact on standing doctrine); *see also San Juan Cnty.*, 503 F.3d at 1192-99 (rejecting DSL test). As *San Juan County* involved a quiet title action, the facts of the case will be discussed in *infra* notes 111-137.

103. *See San Juan Cnty.*, 503 F.3d at 1207 (holding that intervenors have no standing). Although the court did not specifically mention *parens patriae*, it extensively looked at whether sovereign immunity imposed a jurisdictional bar to the conservation group's intervention. *See id.* at 1187. The court concluded Congress never conditioned a waiver to sovereign immunity and therefore, did not bar the potential intervention. *Id.* at 1187.

104. *Id.* at 1198 (rejecting Eighth Circuit's intervention).

Eighth Circuit for intervention as a right.[105] The court believed that the DSL Test failed to recognize the premise of intervention, stating that the test was proper but "not particularly helpful otherwise."[106] Specifically, the *en banc* panel detailed that intervention "should be granted of right if the interests favoring intervention outweigh those opposed."[107] The Tenth Circuit viewed the DSL Test more as a prerequisite, rather than as determinative, to determination.[108] The creation of this new test further increased the separation between the circuits and allowed potential intervenors to "piggyback" on the other parties' standing.[109] In the court's view, this would result in a significantly lower burden of entry into litigation, since the prospective intervenor would only have to show that the original parties in the case had standing.[110]

### E. Conservation Groups Intervenors in Quiet Title Actions

As stated in Section I of this Note, while there has been much debate among the circuits as to whether standing is a prerequisite for intervention, there has been little precedent set in the context of a quiet title action.[111] The quiet title aspect of the case provides a different scenario than the traditional intervention case.[112] The distinction between quiet title intervention cases and traditional intervention cases focuses on the interest presented by the potential intervenor.[113] Courts have classified the requisite interest in a quiet title action as either *in* the title of the property or *in relation to* the property.[114] As described in Section II of this Note, the Eighth Circuit mandates that the interest must be *in* the property.[115] This is

105. *Id.* at 1199 (discussing flaws in Eighth Circuit's approach).

106. *Id.* at 1193 (explaining DSL Test's flaws).

107. *Id.* at 1195 (explaining Tenth Circuit's intervention test).

108. *San Juan Cnty*, 503 F.3d at 1196 (discussing DSL Test's place in intervention).

109. *See* Timms & Castañeda, *supra* note 2, at 434 (discussing *San Juan County*'s impact on standing doctrine).

110. *See Sierra Club*, 405 U.S. at 740-41 (requiring standing for litigation); *see* also *Lujan* 504 U.S. at 561 (following *Sierra Club*'s precedent); *North Dakota*, No. 1:12-cv-125, at *10 (Bloomberg) (same).

111. *See North Dakota*, No. 1:12-cv-125, at *8 (Bloomberg) (discussing lack of Eighth Circuit precedent).

112. *See id.* (discussing unique aspect to quiet title action).

113. *See id.* at *9 (discussing concurrence in *San Juan County*).

114. *See id.* (discussing *San Juan County*'s opinion and concurrence); *see also San Juan Cnty.*, 503 F.3d at 1211 (setting precedent in quiet title action).

115. *See* North Dakota ex rel. Stenehjem, 787 F.3d 918, 921 (8th Cir. 2015) (mandating interest must be in property).

not the consensus opinion, however, to intervention in quiet title actions.[116]

The first case that set the precedent for intervention in a quiet title action was the Tenth Circuit's decision in *San Juan County*.[117] The property at issue in *San Juan County* was a disputed right-of-way between San Juan County, Utah and the United States.[118] In a seven to six decision, the *en banc* panel found that the conservation groups seeking to intervene in the dispute had a sufficient interest in the litigation.[119] The court rejected the notion that in a quiet title action the intervenor's interest must be *in* the property.[120] Rather, the court stated that the interest must only be *in relation to* the property.[121] By adopting the less stringent standard, the majority expressed greater concern with the practical effect of denying intervention instead of the legally compelled effect.[122]

The concurrence in *San Juan County* adopted the approach rejected by the majority; in a quiet title action, the intervenors must have an interest *in* the property in a quiet title action.[123] The concurring judges differentiated between the use and ownership of the disputed right-of-way.[124] They believed that a mere change in title did not have a "practical effect" on the use of the land, and therefore barred the conservation groups from involvement in the litigation.[125] In summarizing the minority's view, Judge McConnell aptly stated, "[the conservation group's] members have enforceable statutory rights regarding how the land is administered *if* the United

116. *See generally San Juan Cnty.*, 503 F.3d at 1163 (rejecting DSL Test); *see also Hazel Green Ranch*, 2007 WL 2580570 at *8-29 (following *San Juan County*).

117. *See San Juan Cnty.*, 503 F.3d at 1197-99 (discussing intervention in quiet title actions).

118. *See id.* at 1171-72 (explaining relevant facts); *see also North Dakota*, No. 1:12-cv-125, at *9 (Bloomberg) (explaining *San Juan County*'s facts).

119. *See San Juan Cnty.*, 503 F.3d at 1200 (finding conservation groups had sufficient interest); *see also North Dakota*, No. 1:12-cv-125, at *9 (Bloomberg) (discussing *San Juan County*'s holding). For more information on the Tenth Circuit test applied to find against standing as a prerequisite for intervention, refer to *supra* notes 100-110.

120. *San Juan Cnty.*, 503 F.3d at 1200 (discussing Rule 24(a) requirements).

121. *See id.* (discussing Rule 24(a)).

122. *See id.* (discussing effect of judgment in county's favor). By stating that the interest only needs to be *in relation to* the property, the Tenth Circuit allowed for potential intervenors to obtain standing in quiet title actions as long as they show a small, or even minimal, interest relating to the property. *See North Dakota*, No. 1:12-cv-125, at *10 (Bloomberg). By contrast, the Eighth Circuit requires potential intervenors to show an interest *in* the title of the disputed property. *See id.*

123. *See San Juan Cnty.*, 503 F.3d at 1208 (disagreeing with majority's precedent).

124. *Id.* (discussing precedent set by majority).

125. *Id.* (distinguishing between land use and ownership).

States owns the land, but they have no legal rights regarding *whether* the United States owns the land".[126] As detailed in this Note and subsequent cases, this split decision set the standard for intervention in quiet title actions.[127]

One year after the decision in *San Juan County*, another intervention in a quiet title action arose in the Eastern District of California.[128] In *Hazel Green Ranch, LLC. v. U.S. Department of the Interior*,[129] conservation groups sought to intervene in a quiet title action between Hazel Green Ranch and the United States over rights of way and easements in Yosemite National Forest.[130] The United States opposed this intervention, claiming that the conservation groups had to have an interest *in* the property.[131] The district court adopted the approach by the majority in *San Juan County*, stating that the significantly protectable interest does not have to be *in* the property under the Quiet Title Act.[132] Rather, citing the Ninth Circuit, the interest in the property had to only be protected under "some law."[133]

The Eastern District of California's decision to allow the potential intervenors to "piggyback" on the standing of another party in a quiet title action was consistent with the Tenth Circuit's majority decision in *San Juan County*.[134] Further, the Eastern District of California stretched the precedent set by the Tenth Circuit, allowing the potential intervenor to intervene as long as their interest was protected under *some* law.[135] Specifically, the district court did not

126. *Id.* at 1211 (discussing problems with majority's opinion).

127. *See North Dakota*, No. 1:12-cv-125, at *9 (Bloomberg) (discussing *San Juan County*'s impact); Friends of Panamint Valley 499 F. Supp. 2d at 1165 (same); *see also Hazel Green Ranch*, 2007 WL 2580570 at *8-27) (discussing intervention in quiet title actions).

128. *See generally Hazel Green Ranch*, 2007 WL 2580570 (litigating over quiet title in California).

129. No. 1:07-CV-00414-OWW-SMS, 2007 WL 2580570 (E.D. Cal. Sept. 5, 2007).

130. *Id.* at *3 (discussing factual history).

131. *Id.* (discussing United States' opposition to intervention).

132. *Id.* at *9 (discussing court's finding for intervention).

133. *See id.* at *9-12 (discussing Ninth Circuit precedent). The court found that the proposed intervenor's interest was protected under the Organic Act, the Endangered Species Act, and the National Environmental Policy Act. *Id.* at *5.

134. *See Hazel Green Ranch*, 2007 WL 2580570, at *9) (discussing Ninth Circuit's precedent of intervention); *see also San Juan Cnty.*, 503 F.3d at 1200-01 (en banc) (allowing intervention in quiet title actions). The court allowed the conservation groups to intervene on the conditions that they "limit[ed] their participation to claims or defenses not already advanced by the government." *Hazel Green Ranch*, 2007 WL 2580570, at *1.

135. *See Hazel Green Ranch*, 2007 WL 2580570, at *9-12 (stating interest must be protected under "some law").

distinguish between interventions under the Quiet Title Act from interventions under other statutes.[136] The holdings in *San Juan County* and *Hazel Green Ranch* are significant in setting the precedent for requiring an intervenor's interest in quiet title actions to only have to be related to the property.[137]

## IV. TUCKING IN THE CONSERVATION GROUPS: NARRATIVE ANALYSIS OF THE EIGHTH CIRCUIT'S DECISION

Circuit Judge Colloton delivered the opinion for the Eighth Circuit.[138] Looking to the Eighth Circuit's precedent, Judge Colloton followed the requirement of Article III standing as a prerequisite to intervention as of right.[139] Using *Mausolf*, the court looked first at whether the Conservation Groups (Groups) satisfied the requirements under Rule 24(a).[140]

The Eighth Circuit began its analysis by discussing when a party is entitled to intervene under Rule 24(a).[141] In analyzing whether the Conservation Groups met the requirements for intervention, the court opted not to provide an in-depth analysis as to whether the Groups had a recognized interest in the subject matter of the litigation or had been impaired in the disposition of the litigation.[142] Rather, the court focused on the third element of intervention: adequate representation.[143] The court directly stated that the Groups "failed to show that the United States does not adequately represent their interests in this quiet title action."[144]

As discussed above, because the United States is a sovereign, the bar to show adequate representation is raised under *parens pa-*

136. *See id.* (ignoring difference between quiet title action intervention and traditional intervention).

137. *See San Juan Cnty.*, 503 F.3d at 1200-01 (holding interest does not have to be *in* property); *see also Hazel Green Ranch*, 2007 WL 2580570, at *9-12 (requiring interest only need to be protected by "some law").

138. *See* North Dakota ex rel. Stenehjem v. United States, 787 F.3d 918, 920 (8th Cir. 2014) (introducing author of opinion).

139. *See id.* (stating in order to intervene as of right, prospective intervenors must satisfy requirements of Rule 24(a) and Article III standing).

140. *See id.* (establishing that Eighth Circuit would look at whether Groups satisfied Rule 24(a) before determining if they had Article III standing).

141. *See id.* at 921 (discussing requirements for intervention as of right). For a more in-depth discussion of the rules required for intervention as of right, see *supra* notes 66-71 and accompanying text.

142. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (disregarding first two elements of intervention of right under Rule 24(a)).

143. *See id.* (focusing on adequate representation).

144. *Id.* at 921 (focusing on Groups' failure to prove that United States did not adequately represent their interests).

*triae*.[145] The court stated that the Conservation Groups' argument, in that they faced a narrower and more personal harm, did not satisfy the exception that the "government would [have to] be 'shirking its duty' to advance the 'narrower interest' of a prospective intervenor 'at the expense of its representation of the general public interest' . . . ."[146] The court stated that the Groups' interests were parallel to the interests of the United States in the litigation.[147]

To further demonstrate that the Conservation Groups did not meet this exception, the court focused on the merits of the dispute between North Dakota and the United States.[148] Citing the district court's motion denying intervention, the Eighth Circuit clarified that the dispute arose over a quiet title action, not the *best use of public lands*.[149] Additionally, the Eighth Circuit noted that the lawsuit was not about potential land management decisions where the United States may have to make decisions against the interests of the Groups.[150] Specifically, the court stated that the interests were parallel; the United States retains title to the right-of-ways.[151] Consequently, applying *Mausolf* and *parens patriae*, the narrow interests presented by the Groups fell under the interests represented by the United States.[152]

Next, the Eighth Circuit addressed the counterargument by the Conservation Groups that the United States did not adequately represent their interests because of the United States' history of managing the Grasslands and its previous settlement in a lawsuit over land management decisions.[153] The court dismissed these arguments.[154] The Eighth Circuit stated that the Groups must be

145. *See id.* (discussing heightened standard of adequate representation under *parens patriae*).

146. *Id.* at 921 (discussing exception to *parens patriae*); *see also* Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1000 (8th Cir. 1993) (discussing *parens patriae*). The Groups' narrower and personal harm is their environmental and aesthetic interests in the land. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 920.

147. *North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (discussing parallel interest of United States and Groups).

148. *See id.* at 921 (explaining how case is over title of rights-of-ways in Grasslands).

149. *See id.* (discussing details of case).

150. *See id.* (explaining why United States adequately represents Groups' interests).

151. *See id.* at 922 (discussing why United States represents groups' interests).

152. *North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (discussing how Groups' interests relate to interests of United States).

153. *Id.* at 922 (addressing Groups' argument regarding United States' management of the Grasslands).

154. *See id.* (discussing court's rejection to Groups' counterargument).

able to strongly show inadequate representation and "that the *parens patriae* has committed misfeasance or nonfeasance in protecting the public."[155] Contrasting the present case to *Mausolf*, the court stated that the United States did not have a "clear dereliction of duty," and therefore, did not overcome the presumption of adequate representation.[156]

Moreover, the court returned to discussing the merits of the case.[157] The court stated that arguments set forth by the Conservation Groups were immaterial, as the United States settling a lawsuit regarding the *use* of the Grasslands did not represent the United States' *ownership interest* in the land.[158] As demonstrated by this litigation, the court believed that the United States had vigorously defended its title to the right-of-ways and saw no evidence presented to the contrary.[159] Because the Conservation Groups were unable to show that the United States did not adequately represent their interests, the court affirmed the district court's dismissal of intervention as of right.[160]

In analyzing the Groups' petition for permissive intervention, the Eighth Circuit deferred to the district court.[161] The court stated that the decision to allow permissive intervention is "wholly discretionary" and that the district court determined that "the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights", and denied the Conservation Groups' Rule 24(b) claim.[162] Consequently, the Eighth Circuit stated that the Conservation Groups failed to meet the prerequisites required for both intervention of a right and permissive intervention, and affirmed the district court's denial of intervention.[163]

---

155. *See id.* (discussing requirements for rebutting presumption of adequate representation). *See generally* Chiglo v. City of Preston, 104 F.3d 185 (8th Cir. 1996) (discussing adequate representation).

156. *See North Dakota eax rel. Stenehjem*, 787 F.3d at 921 (contrasting *Mausolf* to present case); *see also* Mausolf v. Babbitt, 85 F.3d 1295, 1295 (8th Cir. 1996). For a more in-depth conversation regarding *Mausolf*, see *supra* notes 82-89 and accompanying text.

157. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (explaining how case involves quiet title action).

158. *See id.* (discussing flaws in Groups' argument).

159. *See id.* (detailing United States' fight to retain title to right-of-ways).

160. *See id.* (denying Groups' intervention).

161. *See id.* at 923 (describing court's analysis of Groups' claim for permissive intervention).

162. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (explaining court's reasoning for denying intervention claim).

163. *See id.* (holding that district court did not err in denying Groups' motion for intervention).

## V. TOSSING AND TURNING: CRITICAL ANALYSIS OF THE EIGHTH CIRCUIT'S DECISION

The Eighth Circuit's rationale in *North Dakota ex rel. Stenehjem* relied upon the United States' adequate representation of the Conservation Groups' interests.[164] Although the court is consistent in applying its precedent of standing as a prerequisite for intervention, the opinion failed to go into the amount of depth required to find such a holding.[165] Rather than only discussing whether the Conservation Groups met the requirements for intervention, the court should have extracted more from the opinion of Judge Hovland and the District Court of North Dakota.[166] By applying the set of facts to the requirements for Article III standing and intervention, as well as discussing the discrepancies between the circuits, the district court presented a clearer interpretation of the issues before the court.[167] Additionally, the Eighth Circuit should have focused more on the quiet title aspect, which would have clarified that the Conservation Groups did not have a legally protectable interest in the land.[168] While the Eighth Circuit reached the proper conclusion, the court did not capitalize on the opportunity to further cement itself as a leading circuit requiring standing for intervention.[169]

### A. Omission of Standing

A glaring omission in the Eighth Circuit's opinion is the lack of discussion on standing.[170] The Eighth Circuit discussed the precedent set in *Mausolf*, instead of applying the standing requirements from *Lujan* to the facts before them.[171] In *San Juan County*, the

164. *See id.* at 921 (stating adequate representation by Conservation Groups).

165. *See id.* (discussing *Mausolf* and *Chiglo*).

166. *See* North Dakota v. United States, No. 1:12-cv-125, at *3-8 (D.N.D. Feb. 4, 2014) (Bloomberg) (explaining requirements for intervention and applying them to Conservation Groups).

167. *See id.* (discussing Eighth Circuit's interpretation in comparison to that of district court).

168. *See id.* at *8 (explaining how Groups did not assert or claim interest in land).

169. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 920-23 (discussing lack of ability for Groups to intervene).

170. *See id.* (failing to discuss issue of standing).

171. *See id.* at 920 (discussing rule in *Mausolf*). *See generally* Mausolf v. Babbitt, 85 F.3d 1295, 1295 (8th Cir. 1996) (holding standing is prerequisite to intervention). As stated above, the Eighth Circuit adopted the idea that the inclusion of an intervenor to an Article III case or controversy must have standing. *Id.* at 1300; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (discussing intervention).

Tenth Circuit discussed in great detail the issue of standing as a prerequisite to intervention.[172] The Tenth Circuit's opinion discussed the circuit split and the rationale exercised by each circuit.[173] The discussion on standing in *San Juan County*, a case with nearly identical facts to *North Dakota ex rel. Stenehjem*, makes the Eighth Circuit's omission more apparent.[174] The similarity between the facts of the cases, combined with the differing views of the circuits, should have led the Eighth Circuit to address standing in greater detail.[175]

Moreover, the Eighth Circuit's want of an in-depth discussion of standing may cause lower courts to interpret standing as equal, and therefore separate, to intervention.[176] The *Mausolf* court recognized that there is no case or controversy if a party lacks Article III standing.[177] The court has intended for standing to be a prerequisite to intervention since it is the objective of the prospective intervenor when litigating in the Eighth Circuit.[178]

The Eighth Circuit's brief mention of the standing requirement undermines the court's effort to emphasize the role of standing as a prerequisite to intervention.[179] If the Eighth Circuit analyzed the standing issues before addressing the intervention issues, the court would have followed the precedent set forth in *Mausolf* and *Chiglo*.[180] Instead, courts may look at the Tenth Circuit's reasoning *San Juan County*, which addressed standing, and mistakenly construe the holding to mean that the Eighth Circuit

---

172. *See* San Juan Cnty. v. United States, 503 F.3d 1163, 1200-01 (10th Cir. 2007) (en banc) (discussing standing and requirements in Tenth Circuit).

173. *See id.* at 1197 (explaining differing circuit's approach to standing and intervention).

174. *See id.* (discussing facts of *San Juan County*).

175. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 920-23 (discussing intervention and standing in quiet title actions).

176. *See id.* at 921 (discussing potential results regarding standing before intervention).

177. *See Mausolf*, 85 F.3d at 1300 (describing standing requirement for case or controversy in Eighth Circuit); *see also* Timmermans, *supra* note 3, at 1429 (discussing standing).

178. *See* Timmermans, *supra* note 3, at 1429 (stating standing is prerequisite for intervention); *Mausolf*, 85 F.3d at 1300 (same); FED. R. CIV. P. 24(a) (same).

179. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (disregarding standing requirement for intervention); *see also* Karastelev, *supra* note 2, at 470-73 (discussing impact of Article III standing in intervention).

180. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (describing intervention issues); *Mausolf*, 85 F.3d at 1300 (same); Chiglo v. City of Preston, 104 F.3d 185, 187-88 (8th Cir. 1997) (same).

views standing and intervention as interchangeable notions.[181] This potential misinterpretation directly contradicts the Eighth Circuit's original intention in *Mausolf*, as it ensures that all parties in a case or controversy have Article III standing.[182]

## B. Addressing the Circuit Split

In addition to the Eighth Circuit's sparse discussion on standing, the court's discussion regarding the circuit split on the issue was also inadequate.[183] As discussed above, there is a strong divide between circuits on whether standing is a requirement for intervention.[184] The Eighth Circuit is considered one of the stronger circuits for the minority view that standing is required for intervention.[185] The court's lack of discussion regarding the circuit split, specifically the majority viewpoint, represents another missed opportunity for the Eighth Circuit to solidify its position regarding intervention.[186] The Eighth Circuit is the minority opinion on this issue, and therefore, a circuit split discussion would have presented a more complete and compelling opinion.[187]

Specifically, the Eighth Circuit should have discussed a case with similar facts and issues presented before the court: *San Juan County*.[188] The issue before the *en banc* panel was whether standing is required for intervention before applying the facts to the case.[189] Significantly, the Tenth Circuit concluded that the DSL test should

181. *See San Juan Cnty.* 503 F.3d at 1188 (describing requirements for intervention); *see also North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (discussing intervention).

182. *See Mausolf*, 85 F.3d at 1300 (describing Article III case or controversy).

183. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (failing to discuss circuit split); *see also* Karastelev, *supra* note 2, at 465-66 (discussing lack of discussion on circuit split).

184. For an in depth discussion about the circuit split regarding this issue, refer to *supra* to notes 76-110 and accompanying text.

185. *See* Timmermans, *supra* note 3, at 1429 (discussing Eighth Circuit's viewpoint on intervention). The D.C. District Court is the other circuit court that requires standing for intervention. *Id.*

186. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (discussing intervention without addressing circuit split).

187. *See id.* (failing to discuss circuit split).

188. *See generally San Juan Cnty.*, 503 F.3d at 1163 (discussing quiet title action presented before Tenth Circuit). The *en banc* panel in *San Juan County* was presented with a quiet title action over a right of way where conservation groups sought to intervene in the litigation. *Id.* For a discussion of the facts and background in *San Juan County*, see *supra* notes 100-110 and accompanying text.

189. *See San Juan Cnty.*, 503 F.3d at 1188-1200 (rejecting DSL Test required in Eighth Circuit).

not be applied to intervention and specifically addressed the circuit split in the Eighth Circuit.[190]

The Eighth Circuit's opportunity to address an identical issue that its sister circuit addressed would have secured standing as a prerequisite for intervention.[191] Instead, the Eighth Circuit altogether failed to address this issue and to adequately explain its reasoning.[192] This missed opportunity is further demonstrated through the holdings of both the Eighth Tenth Circuits.[193] Both circuit courts concluded that the Conservation Groups were not entitled to intervene because they could not overcome the presumption of adequate representation by the United States government.[194] A discussion about the circuit split would have clarified the Eighth Circuit's view and potentially advanced this issue into further discussion by courts in the future.[195]

The Eighth Circuit could have utilized the district court's opinion to discuss the circuit split.[196] The district court used the reasoning in *San Juan County* to help demonstrate how the Tenth Circuit was incorrect in analyzing intervention.[197] The district court's use of the concurrence as further evidence in favor of its reasoning was pertinent in addressing the circuit split.[198] The district court used the Tenth Circuit's "fractured opinion," to help bolster its own opinion, all while remaining consistent with the Eighth Circuit's requirement of standing for intervention.[199] Addressing the majority

---

190. *See id.* at 1198 (discussing Eighth Circuit's viewpoint).

191. *See* Timmermans, *supra* note 2, at 1429 (discussing Eighth Circuit's viewpoint). *See also North Dakota*, No. 1:12-cv-125, at *10 (Bloomberg) (discussing Eighth Circuit precedent).

192. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (discussing reasoning for denying intervention); *see also San Juan Cnty.*, 503 F.3d at 1188 (explaining reasoning for rejecting DSL Test).

193. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (holding against Conservation Groups)*; see also San Juan Cnty.*, 503 F.3d at 1167 (holding for Conservation Groups).

194. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (holding against Conservation Groups); *see also San Juan Cnty.*, 503 F.3d at 1167 (holding for Groups).

195. *See* Timmermans, *supra* note 2, at 464 (providing background on circuit split).

196. *See North Dakota*, No. 1:12-cv-125, at *8-9 (Bloomberg) (discussing Tenth Circuit's holding in *San Juan County*).

197. *See id.* (discussing court's reasoning in *San Juan County*). The District Court of North Dakota acknowledged that *San Juan County* was a "highly fractured *en banc* opinion." *Id.* at *8.

198. *See id.* at *9-10 (discussing dissenting opinion).

199. *See id.* (discussing concurring opinion in *San Juan County* and applying it to *North Dakota*).

and concurring opinions in *San Juan County* would have made the Eighth Circuit's opinion much stronger and clearer.[200]

### C. Lack of Specificity for Quiet Title Action

The Eighth Circuit conceded that the Conservation Groups may hold a recognizable interest in the subject matter of the litigation.[201] As the district court stated, the Eighth Circuit should have addressed that there was no recognizable interest presented by the Conservation Groups because the subject of the litigation was quiet title.[202] By assuming that the Conservation Groups satisfied the requirement for a recognizable interest, the Eighth Circuit allowed the possibility for future conservation groups to claim that they have a recognizable interest in quiet title actions.[203]

Lastly, the Eighth Circuit should have further adopted the district court's analysis denying the Conservation Groups' interest.[204] Instead, the Eighth Circuit engaged in a confusing discussion of the legally recognizable interest during the discussion of adequate representation.[205] The Eighth Circuit failed to make it clear that in quiet title actions the litigant must have an interest *in* the land, not just *in relation to* the land.[206] The Conservation Groups' desire to intervene without any claim to title of the land or concrete evidence of potential harm should have been strongly rebutted and discouraged by the Eighth Circuit, as it had been by the district court.[207] Without this clarity, future litigants may believe that their interests are recognizable in quiet title actions.[208] Had the Eighth Circuit provided more analysis regarding the unrecognizable interest of

200. *See id.* (applying concurrence from *San Juan County* to *North Dakota*).

201. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (conceding that Groups may have recognizable interest).

202. *See North Dakota*, No. 1:12-cv-125, at *10 (Bloomberg) (discussing how Groups do not have recognizable interest).

203. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (assuming Groups had recognizable interest in litigation). This is further demonstrated in *San Juan County*, where the court held that the conservation groups *had* a recognizable interest in the title of the right of way, even though it was over the title and not the use of the right of way. *See San Juan Cnty.*, 503 F.3d at 1200-01.

204. *See North Dakota*, No. 1:12-cv-125, at *10 (Bloomberg) (discussing interests of Groups).

205. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (addressing interests at stake under adequate representation).

206. *See North Dakota*, No. 1:12-cv-125, at *9 (Bloomberg) (discussing interests in quiet title actions).

207. *See id.* at *10 (rejecting groups' interest in land). *But see San Juan Cnty.*, 503 F.3d at 1201 (stating conservation groups have interest in title).

208. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (conceding Conservation Groups had potential recognizable interest in quiet title action).

the Conservation Groups, the court's opinion would have conveyed more significance for the minority viewpoint on standing as a prerequisite to intervention.[209]

## VI. ASLEEP . . . FOR NOW: IMPACT OF *NORTH DAKOTA EX REL. STENEHJEM*

It is difficult to determine whether the Eighth Circuit's holding in *North Dakota ex rel. Stenehjem* will affect future cases involving standing and intervention in quiet title actions.[210] Before *North Dakota ex rel. Stenehjem*, the only other federal circuit case regarding quiet title actions and intervention was *San Juan County*.[211] Currently, courts and litigants are able to draw from both cases to decide the validity of a claim for intervention as of right.[212] Although circuits seem to have come to a decision on whether standing is required for intervention, *North Dakota ex rel. Stenehjem* gives circuits a specific reference to distinguish quiet title actions from other potential issues involving intervention.[213] Only the Supreme Court, however, can decide whether standing is a requirement for intervention.[214] It is difficult to determine how much this case will pressure the Supreme Court to make this determination, but an additional case that directly opposes another circuit's holdings should draw further attention to the issue.[215]

While the holding has the potential to pressure the Supreme Court, this case is unlikely to have a large impact within the Eighth Circuit.[216] As discussed above, the Eighth Circuit has long been a court that required Article III standing as a prerequisite for inter-

209. *See id.* at 921 (discussing requirements for intervention); Timmermans, *supra* note 2, at 1429 (same); Karastelev, *supra* note 2, at 465-66 (same).

210. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (discussing holding by Eighth Circuit).

211. *See* San Juan Cnty., Utah v. United States, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc) (discussing requirements for intervention and standing).

212. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (discussing Eighth Circuit's requirements for intervention as of right)*; see also San Juan Cnty.*, 503 F.3d at 1163 (discussing requirements).

213. *See* Karastelev, *supra* note 2, at 464-67 (explaining differences between Circuits on requirements for intervention). This case may be especially helpful for the First and Ninth Circuits in deciding quiet title actions since they have not "adopted a black letter rule." *Id.* at 467.

214. *See id.* at 484 (explaining need for "one size fits all" standard). The Supreme Court has yet to state whether standing is required for intervention. *Id.*

215. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (holding against intervention).

216. *See id.* (discussing precedent in the Eighth Circuit).

vention.[217] The realistic limitation to this holding in the Eighth Circuit is if another quiet title action surfaces in the circuit.[218] Before this case, the Eighth Circuit had not addressed a claim under the Federal Quiet Title Act prior to this case.[219] Now, having addressed this issue, the Eighth Circuit has precedent to quell potential intervenors that lack Article III standing in quiet title actions.[220]

Potentially, the most significant impact on future intervenors is the Eighth Circuit's concession that intervenors *may* have an interest in the property in quiet title actions.[221] Although the court was clear in holding that the Conservation Groups did not pass the hurdle of *parens patriae*, the absence of specific discussion on the Conservation Groups' interest created an opening for a counterargument to the Conservation Groups' want of a protectable interest.[222] A potential intervenor now has two circuit court cases, *San Juan County* and *North Dakota ex rel. Stenehjem*, that do not explicitly state that there is no interest protectable without a claim to the title of the property.[223] Although the validity of intervention by the potential litigants will depend on the circuit where the litigation occurs there may now be a protectable interest in any potential circuit—sans the Eighth Circuit.[224]

The Eighth Circuit correctly held that the Conservation Groups could not intervene in the quiet title action between North Dakota, the counties, and the United States.[225] Nevertheless, the dearth of a discussion on whether there was an injury in-fact and legally protectable interest, significantly reduced the potential im-

217. *See* Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996) (requiring Article III standing for intervention); *see also* Chiglo v. City of Preston, 104 F.3d 185, 187-88 (8th Cir. 1997) (requiring standing for intervention).

218. *See* North Dakota v. United States, No. 1:12-cv-125, at *8 (D.N.D. Feb. 4, 2014) (Bloomberg) (discussing how Eighth Circuit has not addressed quiet title actions).

219. *See id.* (discussing Eighth Circuit's failure to address quiet title actions).

220. *See id.* at *10 (holding that parties do not have claim under quiet title act without standing requirement).

221. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (conceding for argument sake that Conservation Groups may have adequate interest in property).

222. *See id.* (discussing Conservation Groups' claims).

223. *See San Juan Cnty.*, 503 F.3d at 1195 (stating Groups in case had protectable property interest); *see also North Dakota ex rel. Stenehjem*, 787 F.3d at 921 (stating Groups did not have protectable property interest).

224. *See* Karastelev, *supra* note 2, at 464-67 (discussing minority and majority court split); *see also* Timms & Castañeda, *supra* note 2, at 433-34 (discussing court split).

225. *See North Dakota ex rel. Stenehjem*, 787 F.3d at 922-23 (holding against Conservation Groups).

pact that the opinion could have had on the topic of standing and intervention.[226] Since the Conservation Groups could not show injury in-fact and a legally protectable interest *in* the property, the Court should have further explored, like that of the district court's opinion, why the Conservation Groups should be denied intervention.[227] In the future, the Eighth Circuit should further explain its viewpoints to distinguish itself from other circuits.[228] The Eighth Circuit must continue to draw the line to ensure cases *remain* Article III cases or controversies, despite the Conservation Groups' noble attempt to protect interests of the land.[229]

*Matthew K. Arnold**

---

226. *See id.* at 921 (failing to discuss first two elements required for intervention).

227. *See North Dakota*, No. 1:12-cv-125, at *10 (Bloomberg) (discussing failure of Conservation Groups).

228. *See* Karastelev, *supra* note 2, at 464-67 (discussing Eighth Circuit's minority opinion).

229. *See Mausolf*, 85 F.3d at 1300 (explaining why intervenors lack standing cannot intervene).

* J.D. Candidate, 2017, Villanova University Charles Widger School of Law; B.A., 2014, Villanova University.