No. 08-571

In the Supreme Court of the United States

ELKO COUNTY, NEVADA, PETITIONER

v.

THE WILDERNESS SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
WILLIAM B. LAZARUS
ELIZABETH A. PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an intervenor as of right pursuant to Federal Rule of Civil Procedure 24 must establish independent standing.

2. Whether an intervenor as of right in an action brought pursuant to the Quiet Title Act, 28 U.S.C. 2409a, must establish a property interest in the land.

3. Whether the present case was moot at the time of the proposed intervention or became moot as a result of a subsequent decision by the United States Forest Service to open the land to motorized traffic.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules—Continued: Page

In the Supreme Court of the United States

No. 08-571

ELKO COUNTY, NEVADA, PETITIONER

v.

THE WILDERNESS SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 526 F.3d 1237. The opinion of the district court (Pet. App. 15-46) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2008. Petitions for rehearing were denied on August 1, 2008 (Pet. App. 80-81) and September 8, 2008. The petition for writ of certiorari was filed on October 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a dispute over the status of a road located in Elko County, Nevada. The South Jarbidge Canyon Road runs through the Humboldt-Toiyabe

National Forest, and alongside the West Fork of the Jarbidge River. It provides access to the Jarbidge Wilderness Area in northern Elko County. In the late 1990s, after flooding made the South Jarbidge Canyon Road impassable, a group of Elko County residents threatened to open the road themselves if local officials failed to act. Petitioner then authorized its County Road Department to restore the road. Pet. App. 18-19, 48-50.

In October 1999, the United States filed the present action to enjoin Elko County employees involved in the road reconstruction project from conducting any further work. The United States alleged not only that the county employees were trespassing on federal land, but also that their activities would adversely affect protected bull trout in the adjacent river, in violation of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1)(G). The United States District Court for the District of Nevada granted the injunction, and joined petitioner as a defendant pursuant to Federal Rule of Civil Procedure 21. Petitioner then asserted a counterclaim under the Quiet Title Act, 28 U.S.C. 2409a, contending that it possessed a valid right-of-way over the road pursuant to federal law. Pet. App. 4, 25, 50-51.

2. In March 2001, the parties reached a settlement. The United States agreed not to contest petitioner's right-of-way, and petitioner agreed not to perform any work on the road without obtaining authorization from the United States Forest Service (Forest Service) and complying with federal environmental laws. At that point, respondents The Wilderness Society and the Great Old Broads for Wilderness (collectively, TWS) moved to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2). TWS claimed that ceding a right-of-way to petitioner would adversely af-

fect its members' use and enjoyment of the nearby wilderness area—an interest that, according to TWS, was not adequately represented by the local and federal governments. The district court denied the motion to intervene as untimely. TWS appealed, and the court of appeals reversed. Pet. App. 71-77; see *id.* at 58-61.

On remand, TWS renewed its motion to intervene. It also filed cross-claims against the United States pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 702, challenging the terms of the settlement as violative of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332; the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*; and Forest Service regulations, 36 C.F.R. Pt. 251. Pet. App. 5-6.

3. a. The district court found that TWS had standing to intervene as a plaintiff and bring its cross-claims against the United States, but not to defend against petitioner's counter-claim under the Quiet Title Act. Pet. App. 47-70. TWS had standing to bring its cross-claims because the "members of TWS have suffered harm to their recreational and aesthetic enjoyment of the Jarbidge Wilderness," *id.* at 59-60, and "[e]cological and aesthetic injuries resulting from road building activities on the South Canyon Road * * * are within the zone of interests of statutes designed to ensure that certain procedures are followed in the management of public lands," *id.* at 60-61. However, because TWS had "no property interest in the South Canyon Road," *id.* at 62, it had not suffered an injury in fact from petitioner's right-of-way, *id.* at 61-62, and also was not among "those alleging property rights contested by the United States," who are protected by the Quiet Title Act, *id.* at 62.

Although the court found that TWS had standing to litigate its cross-claims, it then dismissed those claims as not reviewable under the APA. Pet. App. 62-65. "[B]ecause the settlement agreement entered into by the Department of Justice was not an 'agency action,'" the court reasoned, "judicial review under the APA is not available." *Id.* at 64 (quoting 5 U.S.C. 704). Yet the court nevertheless stayed the settlement agreement. *Id.* at 66-69. According to the court, the United States' disclaimer of any property interest in the road "equate[d] to the issuance of a right-of-way, which triggers the requirement that the government comply with FLPMA, NEPA, and Forest Service regulations." *Id.* at 68. The court thus "no longer [found] the settlement to be fundamentally fair to the public interest," *ibid.*, and stayed the settlement "pending compliance by the Forest Service with these laws," *id.* at 69.

b. After an evidentiary hearing involving petitioner and the United States, the district court approved the settlement. Pet. App. 15-46. It found that the United States had not granted petitioner a property interest in the land, but only had agreed to forbear claiming trespass in the future if petitioner complied with federal environmental laws. *Id.* at 25-26, 30. Thus, the court's previous decision "was based upon insufficient evidence, which has since been rectified." *Id.* at 46. Moreover, "[t]he Government has now completed all environmental studies that these governing statutes require." *Ibid.* The court therefore concluded "that the Settlement Agreement is fair, adequate and reasonable, and conforms to all applicable law." *Ibid.*

4. The court of appeals reversed. Pet. App. 1-14. It held that "[its] prior opinion foreclosed any argument" that TWS "[was] not entitled to intervene" in the

Quiet Title Act action. *Id.* at 8. "Because the intervenors were not permitted to participate in the settlement review proceedings," *id.* at 9, the court vacated the settlement. It rejected the government's argument that the Attorney General's decision to settle the case was committed to his discretion by law and thus unreviewable under the APA, 5 U.S.C. 701(a)(2). Pet. App. 10-12. Finally, the court recognized that TWS had filed "an independent action in district court to challenge the Forest Service's decision to open a road to vehicular traffic" and that "construction of the road has begun," but the court "express[ed] no opinion on the merits of this independent action or whether, on remand, any party may successfully contend that the matter has become moot." *Id.* at 13.

ARGUMENT

Petitioner contends that this Court should grant certiorari to determine (1) whether an intervenor as of right pursuant to Federal Rule of Civil Procedure 24 must establish independent standing (Pet. i, 9-13); (2) whether an intervenor as of right in a federal quiet-title action must establish a property interest in the land (Pet. 14-21); and (3) whether this case was moot when TWS moved to intervene or else has become moot as a result of subsequent developments (Pet. 21-24). The first claim is not presented by this case; the second claim is neither clearly presented, nor the subject of any split of authority, nor ripe for review; and the third claim is best addressed by the lower courts in the first instance. None of these claims presently merits further review.

1. Petitioner lists, as a separate question presented, whether a proposed intervenor of right is "required to have independent Article III and prudential standing."

Pet. i. Petitioner also discusses a putative split among the courts of appeals over "whether Article III standing is necessary to support intervention in the district courts in every case." Pet. 9; see Pet. 10 ("The Ninth Circuit's position on the necessity of establishing independent Article III standing to support intervention of right * * * is ambiguous.").

But that question is not presented by this case. The court of appeals did not conclude that TWS could intervene even if it lacked Article III standing. Rather, the court concluded that TWS *had* Article III standing. According to the court, "the intervenors were entitled to intervene because they had the requisite interest in seeing that the wilderness area be preserved for the use and enjoyment of their members." Pet. App. 8. That interest, the court concluded, "was sufficient to allow them to intervene under Federal Rule of Civil Procedure 24(a) *and to satisfy any requirements of Article III standing*." *Ibid.* (emphasis added); see Pet. 14 ("The Ninth Circuit panel in May, 2008, held that if TWS needed Article III standing to intervene, it had it by virtue of its interest in the environment.").

2. Petitioner takes issue with whether TWS's environmental interest actually did suffice for standing. It asserts, as its second question presented, that TWS's environmental interest is "[not] sufficient to confer Article III and prudential standing on a proposed intervenor in a Quiet Title action under 28 U.S.C. [2409a]." Pet. i. According to petitioner, an intervenor in a quiet title action must assert "a claim of ownership to the real property in issue," Pet. 7, and not merely "a significant protectable interest in the subject matter of the law suit," Pet. 8. Otherwise, intervenors will be able "to challenge or promote general federal policy before the court in quiet title

actions." *Ibid.* While petitioner is correct that TWS should not have been permitted to intervene in this case, TWS is incorrect that the question presently merits the Court's attention for three reasons.

First, petitioner's claim is not clearly presented by this case. Although the district court did not permit TWS to intervene as a defendant in petitioner's quiet-title counterclaim, it *did* permit TWS to intervene as a plaintiff in order to bring cross-claims against the United States under the APA. Pet. App. 57. Petitioner did not cross-appeal that portion of the district court's judgment, which did not matter at the time because the court separately dismissed the counterclaims as unreviewable under the APA. *Id.* at 64-65. The court of appeals, however, held that the cross-claims were reviewable, *id.* at 12, and petitioner does not challenge that portion of the decision below before this Court. The net effect is that TWS can participate in the litigation. Whether it participates as a plaintiff or a defendant, it advances the same arguments and seeks the same relief: it wants the settlement agreement vacated on the ground that the United States failed to comply with applicable environmental laws in entering into the settlement. See TWS C.A. Br. 23 n.12. And the court of appeals made clear that TWS's status as an intervenor does not give it the right to veto a settlement. Pet. App. 8a-9a.

Second, even assuming the question were presented, petitioner's claim is not as yet the subject of any split of authority. Petitioner points to only one decision from another court of appeals to consider the question, *San Juan County* v. *United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc), and in that quiet-title action a majority of the en banc court concluded that an environmental group without a claim of ownership to the property at

issue nevertheless had an interest "relating to" the action for purposes of Federal Rule of Civil Procedure 24(a)(2). *San Juan County*, 503 F.3d at 1200-1201.

Third, any review of the court of appeals' decision would be premature because that decision is interlocutory. Issues remain on remand concerning the nature of objections TWS would be permitted to raise and the degree to which those objections would furnish a basis for the court to disapprove the settlement between the principal parties. If petitioner and the United States are ultimately successful in obtaining judicial approval of the settlement agreement, the claim that petitioner raises in its petition will be moot. On the other hand, if the settlement agreement is not approved, petitioner will be able to raise the instant claim—together with any other claims it might have—in a petition for a writ of certiorari seeking review of the judgment rejecting the agreement. Accordingly, petitioner's case is not ripe for review at this time.

3. Petitioner asserts (Pet. 21-24) that this Court should determine whether this case was moot when TWS moved to intervene, or in the alternative became moot when the Forest Service opened South Jarbidge Canyon Road to motorized traffic. Petitioner's former assertion is incorrect. TWS moved to intervene before the district court had approved the settlement agreement, at which point the question of whether that agreement complied with applicable federal laws was not moot. Accordingly, it is irrelevant whether "one seeking to intervene in an otherwise moot case in which all parties have settled all issues, must have standing," Pet. 21, because the case was not otherwise moot at the time that TWS sought to intervene.

Petitioner's latter assertion was expressly not decided by the court of appeals, see Pet. 24, and it cites nothing for the proposition that the court of appeals was required to address mootness rather than remand to the district court for factual findings. In any event, for purposes of this Court's review, an analysis of mootness is best left to the district court on remand. This Court has repeatedly stated that it ordinarily does not "decide in the first instance issues not decided below." *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); see *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998); *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). There is no reason to depart from that ordinary practice here, in order to determine a factbound question of mootness in the absence of appropriate factual findings from the lower courts. Nevertheless, because there is a very real possibility that the case is moot, that is itself a reason counseling against this Court's review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
WILLIAM B. LAZARUS
ELIZABETH A. PETERSON
Attorneys

FEBRUARY 2009