TRASHING THE PRESUMPTION: INTERVENTION ON THE SIDE OF THE GOVERNMENT

BY

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Rule 24 of the Federal Rules of Civil Procedure allows anyone with a legally protectable interest facing impairment to intervene in existing litigation as a matter of right, subject to whether existing parties in the litigation adequately represent the proposed intervenor's interest. When an existing party is a governmental body, there is a further presumption, based on the common law doctrine of parens patriae, *that the governmental entity adequately represents the interests of all its citizens.*

This Comment examines the history of intervention as a matter of right and application of the presumption of adequacy of representation, with a focus on environmental groups petitioning to intervene on the side of the federal government. History shows that extension of the parens patriae *doctrine to the modern federal administrative state is based upon weak precedent, and unfairly biased against environmental groups representing noneconomic interests. Federal circuits apply the presumption inconsistently, varying by court and by time based upon underlying political forces influencing federal policy.*

This Comment argues that by abandoning the presumption of adequate representation in favor of the "minimal burden" standard first articulated by the United States Supreme Court in Trbovich v. United Mine Workers of America, *both environmental groups as well as business interests will benefit from improved consistency and fairness when petitioning to protect their interests.*

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I. INTRODUCTION

Intervention as a matter of right under Rule 24 of the Federal Rules of Civil Procedure (Rule 24) provides environmental groups a path to protect aesthetic and conservation interests threatened by existing litigation.[1] Courts typically construe Rule 24 liberally in favor of intervention, recognizing efficiency gains from single-proceeding dispute resolution and improved decision quality from optimal information availability.[2] Congress may confer statutory intervention of right,[3] but more commonly, Rule 24 offers proposed intervenors an opportunity to join existing litigation to protect interests facing possible impairment.[4] The proposed intervenor must show a "direct, substantial, and legally protectable"[5] interest that "may as a practical matter" suffer impairment from the existing litigation.[6] When the proposed intervenor establishes a sufficient interest and possible impairment to that interest, a motion to intervene will be granted if the would-be intervenor can establish that existing parties in the litigation will not adequately represent that interest.[7]

Adequacy of representation is presumed when the interests of the intervenor and the existing parties are identical.[8] When an existing party is a governmental body, there is a further presumption that the government, operating in its sovereign capacity,

1 FED. R. CIV. P. 24(a).

2 Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 720–29 (1978).

3 The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides a good example in the environmental context. 42 U.S.C. §§ 9601–9675 (2006). CERCLA states "any person may intervene as a matter of right" in a civil enforcement action and then lists requirements that echo those of Rule 24(a)(2). *Id.* § 9613(i).

4 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 24.03 (3d ed. 2008).

5 *Id.* § 24.03[2][a].

6 FED. R. CIV. P. 24(a)(2).

7 *Id.*; MOORE ET AL., *supra* note 4, § 24.03[1][a].

8 MOORE ET AL., *supra* note 4.

represents the interests of all citizens.[9] This presumption stems from a common law doctrine known as *parens patriae*, or literally "parent of his or her country."[10]

The presumption of adequate representation by the government unfairly limits intervention by environmental groups, public interest groups, and business interests alike, and should be abandoned in favor of a "minimal burden" approach. Courts must recognize the realities inherent in today's complex regulatory environment and polarized electorate. Governmental organizations represent broad interests applicable to all citizens, and cannot effectively represent narrow and possibly conflicting interests, whether environmental or economic. Governmental regulators also shift positions based on political forces, a phenomenon especially prevalent on environmental issues over the last thirty years.[11] Environmental groups attempting to intervene on behalf of the government to protect noneconomic interests such as clean air and water, endangered species, and open wilderness, face inconsistent application of the presumption.[12] With little United States Supreme Court guidance in this area, federal court decisions vary both by federal circuit and by time, with political polarization impacting the courts as well. Groups representing economic interests currently enjoy a straightforward path to rebut the presumption, but the sensitivity of intervention decisions to political trends should motivate commercial and environmental groups to work together in favor of a "minimal burden" standard. By eliminating the presumption of adequate representation, all organizations with legitimate interests facing impairment by existing litigation can intervene consistently, allowing the judicial system to reap the benefits of economies of scale and decision accuracy.

Part II of this Comment provides an overview and brief history of Rule 24, with focus on intervention as a matter of right. Part III reviews the leading Supreme Court case dealing with the presumption of adequate representation by the government, the 1972 decision in *Trbovich v. United Mine Workers of America*.[13] Part IV discusses the origins of the *parens patriae* doctrine and its early application to intervention attempts by environmental groups. Part V argues for elimination of the presumption, based on weak legal underpinnings and unsuitability for the modern administrative state.

Those with the motivation, means, passion, and expertise to argue for environmental causes—or yes, even for business interests that run directly counter to environmental causes—should be allowed to intervene on behalf of the government without facing an inconsistent, ineffective, and arbitrary presumption.

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9 *Id.* § 24.03[4][a][iv][A].

10 BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

11 *See, e.g.*, RICHARD N. L. ANDREWS, MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY 255–62 (2d ed. 2006) (describing regulatory policy changes at the United States Environmental Protection Agency resulting from the 1980 election and subsequent congressional elections).

12 For an example of inconsistent application of the presumption within the same federal circuit, see *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Dep't of the Interior* (*Coalition*), 100 F.3d 837 (10th Cir. 1996), and *San Juan County v. United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc).

13 404 U.S. 528 (1972).

II. INTERVENTION: RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules of Civil Procedure, as first adopted in 1938, recognized the rights of nonparties to join existing litigation to protect their interests.[14] An effective intervention rule must balance the interests of the initial parties and their right to control the litigation with the interest of the intervenor facing a threat from the outcome. The rule must also recognize the interests of the judicial system in efficiency of dispute resolution, economy in the use of judicial resources, and the accuracy of judicial decisions.[15] The goal must be maximization of all interests rather than rejection of any given one.[16]

The 1938 version of Rule 24 recognized intervention of right in two situations: 1) the purpose of the existing litigation was to decide competing claims to property in which the nonparty held an interest; and 2) the existing litigation would extinguish the nonparty's claim under res judicata principles.[17] As no effective alternative remedy for the would-be intervenor existed in these situations, judicial fairness called for an "absolute" right to join the existing litigation.[18]

Other situations calling for intervention of right frequently arose in practice. For example, a would-be intervenor may not meet constitutional or statutory standing requirements to bring suit separately. The intervenor and the parties may not be related in such a way that res judicata forecloses alternative remedies, but the precedential effect of a judicial decision under the doctrine of stare decisis may constructively foreclose an alternative remedy.[19] Congress recognized these practical issues and expanded intervention of right with a 1966 amendment of Rule 24:[20]

> (a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[21]

The 1966 version of the rule remains substantively in effect today.[22]

Environmental groups use "intervention of right" as defined in Rule 24(a)(2) to join existing litigation, often between private commercial interests and a governmental entity. Examples include cattle ranchers challenging a decision under

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14 MOORE ET AL., *supra* note 4, § 24App.01[1].

15 John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 330 (1969).

16 *Id.* at 331.

17 MOORE ET AL., *supra* note 4, § 24App.01[1].

18 Kennedy, *supra* note 15, at 334.

19 *Id.* at 336.

20 MOORE ET AL., *supra* note 4, § 24App.05.

21 *Id.*

22 FED. R. CIV. P. 24. The rule has been amended four times since 1966 and the comments of the four amendments indicate that no substantive changes were intended, or the substantive change involved notice in cases challenging the constitutionality of legislation. *See* 28 U.S.C.A. FED. R. CIV. P. 24 (West 2008).

the Endangered Species Act (ESA),[23] development interests challenging denial of a wetlands permit by the United States Army Corps of Engineers,[24] and local governments seeking to quiet title to lands near national parks.[25] When no environmental statute specifies the right to intervene under Rule 24(a)(1), environmental groups turn to the mandatory three-step process for intervention of right where the group must demonstrate a sufficient interest, that disposition of the action may as a practical matter impair, and is not adequately represented by existing parties.[26] Applicants for intervention bear the burden of proof and all three elements must be proven.[27] As a general rule, courts interpret Rule 24 liberally and resolve doubts in favor of the proposed intervenor.[28]

The Supreme Court in *Donaldson v. United States*[29] held the interest in question must be "significantly protectable,"[30] which is often stated as "direct, substantial, and legally protectable."[31] For instance, an interest in real estate easily qualifies, but whether interests of environmental groups such as clean air, clean water, and natural resources qualify is less deterministic. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,[32] the Supreme Court clarified that nonlegally protected interests could suffice for intervention, recognizing again the general idea that the right to intervene should be liberally interpreted.[33] The federal circuits are split over whether Article III standing to sue must be met as a prerequisite for the interest requirement.[34] For example, the District of Columbia Circuit requires standing,[35] while the Tenth Circuit recently rejected standing as a requirement in an en banc decision in *San Juan County v. United States*.[36] The issue remains unresolved and presents an obstacle for environmental groups and public interest groups in particular, as their interests do not fall into traditional notions of property or other legally protected interests.[37]

Once a nonparty establishes a sufficient interest, the next question is whether the existing litigation could impair that interest. The rule defines a flexible test, and the words "may as a practical matter" cast the impairment net wide enough to include a negative stare decisis effect—a harmful judicial precedent—that could flow from resolution of the current action.[38] Once the interest requirement is

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23 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995).

24 Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 101 F.3d 503, 504 (7th Cir. 1996).

25 San Juan County v. United States, 503 F.3d 1163, 1170 (10th Cir. 2007) (en banc).

26 MOORE ET AL., *supra* note 4, § 24.03[1][a].

27 *Id.*

28 *Id.*

29 400 U.S. 517 (1971).

30 *Id.* at 531.

31 MOORE ET AL., *supra* note 4, § 24.03[2][a].

32 386 U.S. 129 (1967).

33 *Id.* at 135.

34 Eric S. Oelrich, Note, *The Relationship Between Standing and Intervention: The Tenth Circuit Answers by "Standing" Down*, 14 MO. ENVTL. L. & POL'Y REV. 209, 209 n.6 (2006).

35 Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731–32 (D.C. Cir. 2003).

36 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc).

37 *See, e.g.*, Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 416 (1991).

38 FED. R. CIV. P. 24; *see* MOORE ET AL., *supra* note 4, § 24.03[3][b].

established, the impairment requirement rarely presents a problem for environmental groups.

This Comment focuses on adequacy of representation, the final requirement for intervention of right and a frequent stumbling block for environmental groups when seeking to intervene on the side of a governmental entity. In *Trbovich*, the Supreme Court held the applicant for intervention has the burden to show the representation "may be" inadequate, and the burden is "minimal."[39] While the applicant's burden is minimal, when an existing party and the applicant have the same ultimate objective, there is a presumption of adequate representation.[40] The presumption requires the applicant show something more than just a disagreement over litigation tactics.[41] When the party in the suit is a governmental entity, there is an additional presumption of adequate representation, particularly when the government brings suit as *parens patriae*.[42] An applicant can overcome the presumption of adequate representation, but the height of the bar varies by jurisdiction.[43] This Comment examines the history of the presumption and its inconsistent application across the various jurisdictions.

III. MINIMAL BURDEN TEST: THE *TRBOVICH* CASE.

The leading case interpreting the adequacy of representation requirement is *Trbovich*, decided by the Supreme Court in 1972. The Secretary of Labor brought suit under the Labor Management and Reporting Disclosure Act (LMRDA),[44] seeking to overturn an election of officers for the United Mine Workers of America (UMWA).[45] The LMRDA allows a union member to file a complaint with the Secretary to allege union election irregularities.[46] The Secretary has an obligation to investigate the complaint, and, if probable cause is found, initiate a civil suit against the union.[47] Mr. Trbovich, as the UMWA member who filed the complaint with the Secretary, moved to intervene on the side of the Secretary.[48] Mr. Trbovich sought to raise additional grounds for setting aside the election and to be an active participant in fashioning relief, including determining rules to ensure fair elections going forward.[49] The district court denied the motion to intervene, reasoning the LMRDA gave the Secretary an exclusive right to challenge a union election.[50] The District of Columbia Circuit Court of Appeals confirmed, and the Supreme Court granted certiorari specifically on the question of whether the LMRDA imposed a statutory ban on intervention by union members.[51]

39 *Trbovich*, 404 U.S. 528, 538 n.10 (1972).
40 MOORE ET AL., *supra* note 4, § 24.03[4][a][ii].
41 *Id.* § 24.03[4][a][iii].
42 *Id.* § 24.03[4][a][iv][A].
43 *Id.* § 24.03[4][a][iv][B].
44 29 U.S.C. § 482(b) (2006).
45 *Trbovich*, 404 U.S. 528, 528 (1972).
46 29 U.S.C. § 482(a) (2006).
47 *Id.* § 482(b).
48 *Trbovich*, 404 U.S. at 529–30.
49 *Id.*
50 *Id.* at 530.
51 *Id.*

The Court first looked to the legislative history of the LMRDA, finding that Congress viewed fair and open union elections as the most effective way to combat abuse of rank-and-file members.[52] Congress also provided that enforcement of fair elections by the Secretary's civil suit would be the exclusive remedy,[53] which the Court interpreted as bar on *separate* suits by union members.[54] The Secretary here opposed intervention in an *existing* suit on the same grounds, arguing that Congress intended to impose a bar against direct participation by union members in *any* LMRDA enforcement action.[55] Continuing to look to legislative history, the Court found Congress intended "(1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections; and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election."[56] The Court held the statute did not bar intervention, "so long as that participation did not interfere with the screening and centralizing functions of the Secretary."[57] In fact, the very purposes and benefits of intervention—to present and resolve all issues in a single litigation proceeding—seem to support the Court's decision here.

After ruling the statute did not bar intervention in an existing enforcement action, the Court next turned to the merits of the motion to intervene as a matter of right under Rule 24(a)(2). The Secretary did not dispute that Mr. Trbovich, as a member of the UMWA, had a legal interest in the litigation that could be impaired by the outcome. The issue was whether the Secretary, operating to enforce fair elections on behalf of all union members, could adequately represent Mr. Trbovich.[58] The Court looked to the text of the LMRDA, finding it placed a duty on the Secretary "to serve two distinct interests, which are related, but not identical."[59] The Secretary first acts on behalf of individual union members who file complaints, and secondly on behalf of the public to protect the more general interest of free and fair union elections.[60] The Court essentially construed that the Secretary, when acting on behalf of a union member, becomes that member's lawyer.[61] While the interests of the individual and the government may typically converge, an individual may have a "valid complaint about the performance of 'his lawyer.'"[62] Recognizing the existence of a narrower interest on the part of Mr. Trbovich, the Court next had to consider whether the difference would suffice to meet the burden of proving inadequate representation. The Court turned to a treatise on federal practice to determine the standard to apply.[63] The court held that "[t]he requirement

52 *Id.* at 530–31.

53 Labor Management and Reporting Disclosure Act, 29 U.S.C. § 483 (2006) ("The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.").

54 Calhoon v. Harvey, 379 U.S. 134, 140 (1964) ("Congress . . . decided not to permit individuals to block or delay union elections by filing federal-court suits . . . .").

55 *Trbovich*, 404 U.S. at 532.

56 *Id.*

57 *Id.* at 533.

58 *Id.* at 538.

59 *Id.*

60 *Id.* at 538–39.

61 *Id.* at 539.

62 *Id.*

63 *Id.* at 538 n.10 (citing JAMES W. MOORE ET AL, FEDERAL PRACTICE § 24.09–1[4] (2d ed. 1969)).

of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."[64] The Court found the mere possibility of conflict in the Secretary's duties sufficient to meet the "minimal" burden.[65] In particular, the Court said the dual functions of the Secretary "may not always dictate precisely the same approach to the conduct of the litigation."[66]

Since the *Trbovich* decision in 1972, the federal courts commonly begin any analysis of adequacy of representation by citing to *Trbovich*, noting the applicant need only prove that representation may be inadequate and the burden is minimal.[67]

IV. ORIGINS OF THE *PARENS PATRIAE* DOCTRINE

The *parens patriae* doctrine derives from English common law.[68] The literal meaning of the Latin phrase is "parent of his or her country."[69] The Supreme Court referenced the doctrine as early as 1900 in *Louisiana v. Texas*,[70] a case challenging Texas quarantine laws that essentially shut New Orleans merchants out of the Texas market.[71] Louisiana brought the case "in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens."[72] The Court rejected original jurisdiction, holding this was not a controversy between two sovereign states, which requires "something more . . . than that the citizens of one State are injured by the maladministration of the laws of another."[73]

The *parens patriae* doctrine entered the modern era as a standing doctrine in *Alfred L. Snapp & Son, Inc. v. Puerto Rico* (*Snapp*),[74] a case arising under the Immigration and Nationality Act.[75] The statute regulated importation of foreign laborers, ensuring that domestic workers, including citizens of Puerto Rico, had priority access to available jobs.[76] The apple harvest on the east coast in 1978 proved especially robust, requiring a sizeable temporary work force.[77] Puerto Rico brought suit under a *parens patriae* theory, alleging east coast agricultural interests had employed foreign-born workers over citizens of Puerto Rico.[78] The Court reviewed the history of the doctrine and asserted that "in order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties."[79] In other words, the State must assert a "quasi-sovereign"

64 *Id.*
65 *Id.* at 539.
66 *Id.*
67 *See, e.g.*, Fund for Animals, Inc. v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003).
68 Jack Ratliff, Parens Patriae*: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000).
69 BLACK'S LAW DICTIONARY 1114 (8th ed. 2004).
70 176 U.S. 1 (1900).
71 *Id.* at 11.
72 *Id.* at 19.
73 *Id.* at 22.
74 458 U.S. 592 (1982).
75 Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).
76 *Snapp*, 458 U.S. at 596.
77 *Id.* at 597.
78 *Id.* at 594, 598.
79 *Id.* at 607.

interest.[80] While declining to put forth an exhaustive definition, the Court noted the basic characteristics of quasi-sovereign actions:

> These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system. . . . One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.[81]

The Court held that unemployment of its citizens constituted a legitimate state interest, allowing Puerto Rico to satisfy *parens patriae* standing to "pursue the interests of its residents . . . in the federal employment service scheme."[82]

States began to employ the doctrine in the environmental context, asserting sovereign interests in the natural resources within their borders. Without referencing the doctrine directly, the State of Georgia employed it in *Georgia v. Tennessee Copper Co.*,[83] bringing suit on behalf of all state citizens to stop pollution from a copper smelter in Tennessee.[84] This obscure decision dealing with Supreme Court original jurisdiction and bills of equity resurfaced in last year's groundbreaking case on Article III standing in the global warming context, *Massachusetts v. United States Environmental Protection Agency* (*Massachusetts v. EPA*).[85] The Court in that case found the Commonwealth of Massachusetts had sacrificed its sovereign prerogative to regulate issues such as greenhouse gas emissions as a price of joining the United States.[86] In order to "protect[] its quasi-sovereign interests," the Court granted the Commonwealth "special solicitude" in the standing analysis.[87] These cases show a governmental body suing in a sovereign capacity to protect sovereign assets such as clean air, clean water, and shoreline. Thus, in the environmental context a potential intervenor will frequently face existing litigation with a governmental body as a party.

The first major decision following *Trbovich* on adequacy of representation when intervening on the side of the government came in 1979. The District of Columbia Circuit Court of Appeals issued a per curiam opinion in *Environmental Defense Fund, Inc. v. Higginson*.[88] Use of the *parens patriae* doctrine in this case first appeared in relation to a request to intervene on the side of the government in environmental litigation.[89] Environmental groups sued under the National Environmental Policy Act (NEPA)[90] to compel the federal government to prepare a

80 *Id.*
81 *Id.*
82 *Id.* at 609.
83 206 U.S. 230 (1907).
84 *Id.* at 237.
85 549 U.S. 497 (2007).
86 *Id.* at 518–19.
87 *Id.* at 520.
88 631 F.2d 738 (D.C. Cir. 1979) (per curiam).
89 *Id.* at 739.
90 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006).

comprehensive Environmental Impact Statement (EIS) for the Colorado River basin.[91] The four states drawing water from the Colorado River sought to intervene on the side of the federal government and the district court granted the motion.[92] The district court, however, denied intervention to local water districts within those states.[93] The district court applied *parens patriae*, reasoning that as subsidiary governmental entities the local water districts were adequately represented by their respective states.[94] One of the local water districts appealed.[95] The court looked to Supreme Court precedent in *New Jersey v. New York*,[96] a 1953 case dealing with intervention of right in an original jurisdiction context. The Court in that case held that intervention in an original jurisdiction matter required a "compelling interest" on the part of the litigants, and a showing why their respective state would not adequately represent them.[97] The D.C. Circuit, while rejecting this "compelling interest" test for matters in a federal district court, nevertheless ruled that courts should "give scope to the *parens patriae* principle."[98] Interestingly, the court cited to *Trbovich*, noting that "an individual seeking intervention is ordinarily required to make a minimal showing that representation may be inadequate," but then reached way back to *Louisiana v. Texas* to conclude "a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interest of all its citizens."[99] The applicant must define an interest that "is in fact different from that of the state and [show] that that interest will not be represented by the state."[100] The court concluded that while a local water district may have a more direct economic interest than the state, there is "no possible divergence" between the positions of the district and the state.[101]

While the majority opinion in *Higginson* was issued per curiam, Circuit Judge MacKinnon prepared a dissent chiding the majority for overlooking the different scope of interests between the state and of the local water district.[102] He noted that the State of Colorado itself argued for the water district's intervention, and dissented on the grounds that "[i]t is really very unusual to deny such a request when the interested parties are in agreement and they have different interests."[103]

The *Higginson* decision could have been limited to its particular facts: when state governments act as *parens patriae* in their sovereign capacity, governmental units that are essentially subsidiaries of a sovereign state have a higher burden to prove inadequacy of representation. The Second Circuit in 1984 instead chose to rely on *Higginson* and extend the doctrine to block intervention of environmental groups seeking to join an environmental enforcement action brought by the federal

91 *Higginson*, 631 F.2d at 739.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 345 U.S. 369 (1953).
97 *Id.* at 373.
98 *Higginson*, 631 F.2d at 740.
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 741 (MacKinnon, J., dissenting).
103 *Id.*

government. The decision in *United States v. Hooker Chemicals & Plastics Corp.* (*Hooker*)[104] marked the beginning of the divergence among the federal circuits that will be explored in Part V of this Comment. In *Hooker*, the United States sued Hooker Chemicals and other defendants for violations of environmental statutes.[105] The violations concerned dumping of hazardous chemical wastes on the American side of the Niagara River in western New York.[106] Environmental groups moved to intervene—two from the United States and two from Canada.[107] They asserted interests in the quality of the drinking water consumed by their members, and alleged the United States was not adequately pursuing alternatives for relocation of a water treatment plant located downriver from the disputed property.[108]

The Second Circuit Court of Appeals, in an opinion by Judge Friendly, affirmed the district court's denial of intervention as a matter of right.[109] The court recognized the "minimal burden" standard from *Trbovich*, but instead applied a "strong showing" standard because the government was acting as *parens patriae*.[110] The court reviewed the history of the doctrine, beginning with a citation to the "trustee, guardian or representative of all her citizens" language from *Louisiana v Texas*.[111] The court next cited *Higginson*, noting that under *parens patriae* the sovereign party seeks to represent all of its citizens, implying that a minimal showing of inadequate representation is not sufficient when attempting to intervene on the side of the government.[112] The court reasoned that "[w]hether or not it is particularly helpful to speak of a 'presumption' of adequate representation by the sovereign in *parens patriae* litigation, . . . a greater showing that representation is inadequate should be required."[113] The court distinguished *Trbovich*, saying the Secretary of Labor in *Trbovich* did not bring the cause of action under a *parens patriae* theory, and that the statute in question contained a built-in conflict.[114] Here the United States brought suit as *parens patriae*, "seeking to abate a dangerous pollution hazard," and the statutes contained no conflicting obligations.[115] "The mere existence of disagreement over some aspects of the remediation necessary to abate the hazard does not demonstrate a lack of capacity on the part of the government as *parens patriae* to represent its constituents fairly and faithfully."[116] The court also considered the legislative history of the Emergency Powers Clause under the environmental statutes, finding that "Congress 'carefully restricted' the rights of private persons to bring or to intervene in actions of this sort."[117] Under the *Hooker* precedent, when the proposed intervenor

104 749 F.2d 968 (2d Cir. 1984).

105 *Id.* at 970–71. The United States sued under the Federal Water Pollution Control Act, 33 U.S.C. § 1364 (2006), the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6973 (2006), and the Safe Drinking Water Act, 42 U.S.C. § 300i (2006).

106 *Hooker*, 749 F.2d at 970.

107 *Id.* at 969.

108 *Id.* at 973–74.

109 *Id.* at 985.

110 *Id.*

111 *Id.* at 984. *See also supra* text accompanying notes 68–73.

112 *Hooker*, 749 F.2d at 985.

113 *Id.*

114 *Id.* at 986–87.

115 *Id.* at 987.

116 *Id.*

117 *Id.*

does not have a private cause of action and the government is acting as *parens patriae*, courts require "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant."[118]

V. TRASHING THE PRESUMPTION

A. The Presumption Rests on Shaky Precedent

The text of Rule 24 contains no reference to a presumption. Intervention is allowed once a sufficient interest and impairment of that interest are established, "unless existing parties adequately represent that interest."[119] The *Trbovich* case, the only Supreme Court case to deal directly with the question of adequate representation when attempting to intervene on the side of government, makes no mention of a presumption. The Court in *Trbovich* established the "minimal burden" standard, relying on the persuasive authority of a treatise.[120] Despite a lack of solid underpinnings in the text of the rule or in Supreme Court precedent, the presumption endures.

History reveals that the *parens patriae* doctrine derived from English common law.[121] It referred to the King's power to serve as a guardian for mental incompetents, and through a scrivener's error the doctrine was extended to cover juveniles.[122] The expansion of the doctrine to quasi-sovereign representation was an American innovation.[123] When acting as a quasi-sovereign, the government acts not on behalf of an individual or group, but rather on behalf of all citizens of the state. Early cases such as *Louisiana v. Texas* raised questions of Supreme Court original jurisdiction, as did the *Georgia v. Tennessee Copper* case, the first case to apply the doctrine in an environmental context. *Massachusetts v. EPA* featured a state suing the federal government on behalf of all citizens who could potentially be harmed by global warming.[124] Thus, this quasi-sovereign doctrine developed in the United States as an outgrowth of federalism and the structure of original jurisdiction of the Supreme Court. States retained sovereign status under the Constitution, and Article III granted the Supreme Court original jurisdiction over controversies with a state as a party.[125] Given practical limitations on the number of cases the Supreme Court can hear under original jurisdiction, the number of cases brought as *parens patriae* by a state must be sharply limited, and a strong showing that a state truly acts on behalf of all citizens rather than a subset makes sense. Therefore, this line of cases, rather than supporting a presumption of adequacy of representation by the government, recognizes that interests of individuals and groups typically differ from those interests of citizens as a whole.

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118 *Id.* at 985.

119 FED. R. CIV. P. 24(a)(2).

120 *Trbovich*, 404 U.S. 528, 538 n.10 (1972).

121 BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

122 Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195, 195–96, 203–04 (1978).

123 George B. Curtis, *The Checkered Career of* Parens Patriae*: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 907–11 (1976).

124 *Massachusetts v. EPA*, 549 U.S. 497, 504, 510, 522 (2007).

125 U.S. CONST. art. III, § 2, cl. 2.

The district court in *Higginson* granted intervention to four states seeking to protect their rights to the Colorado River.[126] By denying intervention to the local water district within one of the states, the court extended the *parens patriae* doctrine to apply to intervention requests in federal district court rather than just original jurisdiction in the Supreme Court.

The Second Circuit, in the 1984 *Hooker* decision, made the leap from applying *parens patriae* to a state suing or intervening as a sovereign to the federal government acting to enforce environmental legislation. The court noted that "the concept of *parens patriae* has been expanded to include actions in which a state seeks to redress quasi-sovereign interests, such as damage to its general economy or environment."[127] The authority cited for this proposition is another case featuring a state suing on behalf of all citizens: *Hawaii v. Standard Oil Co.*[128] The Supreme Court in that case referenced the history of *parens patriae* applied in the quasi-sovereign capacity, noting the pattern of states bringing common law claims and requesting original jurisdiction.[129] The Court in *Hawaii* allowed the state to proceed *parens patriae*, but concluded that the Clayton Act did not authorize a state to sue for damages to the economy from antitrust law violations.[130] The *Hooker* court also referenced cases from the Third, Fifth, and Seventh Circuits, dealing with requests to intervene on behalf of sovereign.[131] The Fifth and Seventh Circuit cases, in turn, cited *Higginson*.[132] The *Hooker* court stated:

> [N]othing in the law of this circuit shakes our agreement with other circuits that in an enforcement action by a governmental entity suing as a *parens patriae*, it is proper to require a strong showing of inadequate representation before permitting intervenors to disrupt the government's exclusive control over the course of its litigation.[133]

Interestingly, the court again cited a treatise, reasoning that "a very compelling showing" is required "when a governmental body is the named party."[134]

The *Hooker* court made a further leap, reasoning that government enforcement of federal environmental statutes under emergency power provisions were analogous to common law actions.[135] The court noted that emergency actions were "not suits to enforce established regulatory standards,"[136] but instead "essentially a codification of common law public nuisance remedies."[137] By

126 *Higginson*, 631 F.2d 738, 739 (1979).

127 *Hooker*, 749 F.2d 968, 984 (2d Cir. 1984).

128 405 U.S. 251, 258 (1972).

129 *Id.* at 257–59.

130 *Id.* at 261, 264.

131 *Hooker*, 749 F.2d at 985 (citing Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir. 1976)); Del. Valley Citizens' Council for Clean Air v. Pennsylvania, 674 F.2d 970, 973–74 (3d Cir. 1982); New Orleans Pub. Serv. v. United Gas Pipe Line, 690 F.2d 1203, 1213 n.7 (5th Cir. 1982); Wade v. Goldschmidt, 673 F.2d 182, 186 n.7 (7th Cir. 1982).

132 *New Orleans Pub. Serv.*, 690 F.2d at 1213 n.7; *Wade*, 673 F.2d at 186 n.7.

133 *Hooker*, 749 F.2d at 987.

134 *Id.* (quoting 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909, at 524–25, 528–29 (1972)).

135 *Id.* at 988.

136 *Id.*

137 *Id.* (quoting S. REP. 96-172, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023).

drawing an analogy between a sovereign bringing a common law action on behalf of all citizens and the modern federal administrative state bringing a statutory enforcement action, the *Hooker* court greatly expanded the scope of *parens patriae*. The *Hooker* holding depended upon the specific emergency powers provision, but there is really no difference between the government suing to enforce, for example, a specific water quality standard under the Clean Water Act,[138] and the government suing to shut down a polluter based on the emergency powers provision of the Clean Water Act.[139] This expansion of the presumption to specific actions of a federal agency based on enforcement of a statute was unwarranted and set up an inevitable conflict between the government and private parties on both sides of the regulatory divide.

B. The Presumption Is Inappropriate for the Modern Federal Administrative State

The presumption, based on shaky precedent even in genuine quasi-sovereign actions, has no underlying support when applied in the modern administrative state. Government agencies, while representing all citizens, promulgate and enforce rules regulating the behavior of specific individuals and groups. These are not common law actions under which the *parens patriae* doctrine developed, but rather carefully crafted administrative schemes. The nature of regulation sets up a conflict between the regulated and the unregulated. The environmental laws passed in the 1970s particularly set up a conflict between environmental groups in favor of strong enforcement and commercial interests facing the economic impact of zealous government regulation. The government is guaranteed to be in conflict because it must represent both groups. This conflict is especially apparent when the government moves to settle a claim. The process of compromise necessary to achieve settlement implies that both environmental groups and business interests may have more extreme positions than the government and should be involved in fashioning a settlement. The *Trbovich* case showed the inherent conflict between a federal agency regulating union elections while trying to represent the interests of a specific union member. That conflict arises again and again when the government tries to act on behalf of the general public and specific private interests. This section shows the irrelevance of the presumption in the modern administrative state and the harmful effects of its continued application.

1. The Presumption Is Rendered Irrelevant when Economic Interests Are Threatened

The courts readily recognize that the government does not represent economic interests. In the environmental context, this commonly arises when an environmental advocacy group sues the federal government to spur enforcement of environmental laws, and groups claiming economic interests move to intervene. For example, in *Southwest Center for Biological Diversity v. Berg*,[140] environmental groups sued a city and several federal agencies over a species

138 Federal Water Pollution Control Act, 33 U.S.C. § 1319 (2006).

139 *Id.* § 1364(a).

140 268 F.3d 810 (9th Cir. 2001).

management plan developed under the Endangered Species Act.[141] Commercial construction interests sought to intervene.[142] The Ninth Circuit Court of Appeals applied the presumption, but the difference between the government, representing all citizens, and the commercial groups, representing their profits, easily overcame it. The court found that "the City's range of considerations in development is broader than the profit-motives animating developers."[143] The United States Fish and Wildlife Service (FWS) "cannot be expected under the circumstances presented to protect these *private interests*."[144]

The First Circuit Court of Appeals similarly recognized that the government cannot adequately represent private economic interests in *Conservation Law Foundation of New England, Inc. v. Mosbacher* (*Conservation Law Foundation*).[145] Environmental groups brought suit against the Secretary of Commerce over regulations designed to eliminate overfishing, and commercial fishing groups moved to intervene to protect revenues and investments in fleet and other equipment used in commercial fishing.[146] The court reasoned "[t]he Secretary's judgments are necessarily constrained by his view of the public welfare," and that while the public welfare and the interests of fishermen may indeed align, "the fact remains that the fishermen may see their own interest in a different, perhaps more parochial light."[147] Given that "[a]n intervenor need only show that the representation *may* be inadequate,"[148] the court held that "viewed objectively, it is unlikely that the fishing groups' interests . . . would or perhaps even should be adequately protected by the Secretary."[149]

Courts also recognize the federal government's inability to represent economic interests even when other governmental bodies assert those interests. In *Forest Conservation Council v. United States Forest Service*,[150] environmental groups sued under NEPA, alleging violations in management of protected species habitat.[151] The State of Arizona moved to intervene on behalf of the government to protect its interest in timber revenues.[152] The court noted, "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee."[153] The court found, however, that the State of Arizona's interest was sufficiently different to rebut the presumption.[154] The federal government's interest under NEPA concerned adherence to the procedural dictates of the statute, while the State of Arizona asserted possible loss of revenues from an injunction against timber

141 *Id.* at 816.
142 *Id.* at 817.
143 *Id.* at 823.
144 *Id.* (emphasis added).
145 966 F.2d 39 (1st Cir. 1992).
146 *Id.* at 41.
147 *Id.* at 44.
148 *Id.* (emphasis added) (citing *Trbovich*, 404 U.S. 528, 538 n.10 (1972)).
149 *Id.* at 45.
150 66 F.3d 1489 (9th Cir. 1995).
151 *Id.* at 1491.
152 *Id.* at 1492.
153 *Id.* at 1499 (quoting Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir. 1976)).
154 *Id.*

cutting.[155] The court held that "[i]nadequate representation is most likely to be found when the applicant asserts a *personal interest* that does not belong to the general public."[156]

A presumption serves no purpose when it can always be overcome. These cases show that when a proposed intervenor establishes an economic interest facing impairment by existing litigation, the government cannot adequately represent that interest, even when asserted by another governmental body. An irrelevant presumption should be abandoned in favor of the minimal burden standard from *Trbovich*.

2. The Presumption Leads to Inconsistent Judgments when Environmental Interests Are Threatened.

The presumption serves as an unnecessary obstacle when environmental interests are at stake, leading to inconsistent results on motions to intervene. The courts struggle with whether the environmental interests vary sufficiently in scope from those of the government to overcome the presumption. Traditional environmental interests such as clean air and water or endangered species protection are particularly vulnerable to inconsistent treatment. In some situations the courts find the government to be an adequate representative, even when environmental groups and the government faced off in prior litigation.

In *Maine v. Director, United States Fish and Wildlife Service*,[157] the State of Maine and several business groups sued the FWS challenging the designation of Atlantic salmon as endangered under the ESA.[158] Environmental groups, including Defenders of Wildlife, moved to intervene.[159] Defenders had previously sued the government to spur protection of the fish and pushed the court for a categorical rule that prior adverse litigation over a policy decision must establish inadequate representation when that policy decision is later challenged.[160] Not only did the court reject the categorical rule, it denied intervention of right.[161] The court reasoned that *Trbovich* applies only to built-in statutory conflicts, while in this case the interests of FWS and the proposed intervenors were "closely aligned."[162] The court also distinguished *Conservation Law Foundation*, saying, in that situation, "the intervenors had direct *private* interests."[163] The prior litigation between Defenders and the government represented only "a tactical disagreement."[164] So in the First Circuit, traditional environmental interests do not rise to the level of "direct private interest," even when the environmental groups and the government have a history of adverse litigation.

155 *Id.*

156 *Id.* (emphasis added) (quoting JAMES W. MOORE ET AL., 3B MOORE'S FEDERAL PRACTICE § 24.07[4] at 24–78 (2d ed. 1995)).

157 262 F.3d 13 (1st Cir. 2001).

158 *Id.* at 14.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 19.

163 *Id.* at 20 (emphasis added).

164 *Id.*

In contrast, the Ninth Circuit recognized environmental interests may not be adequately represented by the government in *Idaho Farm Bureau Federation v. Babbitt*.[165] The Idaho Farm Bureau, on behalf of ranching interests, sued FWS alleging violations of the ESA.[166] The district court approved intervention by environmental groups and the ranching interests appealed.[167] The Ninth Circuit easily found that the environmental groups would be inadequately represented by FWS. FWS had delayed a listing decision on the Bruneau Hot Springs snail (*Pyrgulopsis bruneauensis*), for many years, and only made the decision after the environmental groups had directly filed suit to compel action.[168] The court ruled "FWS was unlikely to argue on behalf of [the environmental groups], the very organizations that compelled FWS to make a final decision by filing a lawsuit."[169] This shows the presumption can be overcome, even when the litigating positions of the government and environmental groups are not technically adverse.

Maine and *Idaho Farm Bureau Federation* demonstrate that courts make inconsistent decisions in intervention requests, even in the face of prior adverse litigation between the environmental advocates and the government. Courts also make inconsistent decisions when environmental groups and the government do not share a hostile history. Recent district court decisions from the Ninth Circuit highlight this trend. First, in *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District*,[170] the National Association of Home Builders challenged the District's particulate matter regulation under the Clean Air Act.[171] The Environmental Defense Fund and the Sierra Club moved to intervene on the side of the government.[172] The district court found the environmental groups had more narrow interests, construing the interest of the Air Pollution Control District as public health, while the interests of the environmental groups focused on their particular members.[173] Indeed, the court found inadequate representation even when both environmental groups and the government desired tough environmental enforcement.[174]

In a contrasting case from the same district, Hazel Green Ranch, LLC sued the United States Department of the Interior in a quiet title action involving an 83-acre parcel bordering Yosemite National Park.[175] Three environmental groups led by the Sierra Club moved to intervene, asserting traditional interests such as aesthetic and scenic enjoyment.[176] The court concluded the government and the environmental groups had an identical objective: to defeat establishment of the rights of way.[177] The Sierra Club argued their members had more narrow interests in environmental

165 58 F.3d 1392 (9th Cir. 1995).

166 *Id.* at 1397.

167 *Id.*

168 *Id.* at 1398.

169 *Id.*

170 No. 1:07CV-0820, 2007 WL 2757995 (E.D. Cal. Sept. 21, 2007).

171 *Id.* at *1.

172 *Id.*

173 *Id.* at *5.

174 *Id.*

175 Hazel Green Ranch, LLC v. U.S. Dep't of the Interior, No. 1:07CV-00414, 2007 WL 2580570 (E.D. Cal. Sept. 5, 2007).

176 *See id.* at *1 (listing the three intervenors and the various purposes for which they claimed to use and enjoy Yosemite National Park).

177 *Id.* at *11.

protection, and the court recognized potential for conflict in representation by noting the "[i]ntervenors fear that political considerations will deter the government's incentive to litigate vigorously in advancing 'all the interests' intervenors seek to protect."[178] The court ruled against intervention, stating that although "[t]he evidence about adequacy of representation is hotly disputed, it does not preponderate."[179]

The presumption generates inconsistent results when environmental interests are at stake. No clear pattern exists, with factors such as differing scope of interests and prior adverse litigation activity ultimately being nondeterministic. Arbitrary administration of justice is both unfair and inefficient. Application of the presumption not only fails to maximize the interests of the parties, nonparties, and the judicial system, it hinders all the relevant interests. Existing parties, including federal agencies, cannot reliably predict the complexity, cost, and time required for litigation. Intervenors suffer impairment of interest with few or no judicial alternatives to pursue. The additional proceedings resulting from appeals of denied intervention motions thwart judicial efficiency. Eliminating the presumption would return courts to the "may be inadequate" and "minimal burden" tenets of *Trbovich*. While this would undoubtedly lead to more intervention by environmental groups, the benefits to the judicial system from predictability, full information disclosure, and efficiency would predominate.

3. Adequate Representation by the Government Is Impossible in Some Situations

In addition to inconsistent rulings in prior litigation situations, the very existence of adverse litigation between environmental groups and the government strikes at the heart of the presumption. It is impossible for the government to adequately represent a party only recently in an adverse position over the same matter, and even raises ethical questions. The Tenth Circuit Court of Appeals recognized this problem in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior* (*Coalition*).[180] In *Coalition*, cities and other governmental bodies challenged the ESA listing decision for the Mexican spotted owl (*Strix occidentalis lucida*).[181] A commercial photographer, essentially operating as a one-man environmental group, moved to intervene.[182] His dogged pursuit of protection for the owl—including filing a lawsuit to compel government compliance with the ESA—had directly led to the listing decision.[183] The court stated:

> We have here . . . the familiar situation in which the government agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in

178 *Id.*

179 *Id.* at *13.

180 100 F.3d 837 (10th Cir. 1996).

181 *See id.* at 839.

182 *See id.* (describing various steps the photographer took to protect the Mexican spotted owl leading up to his application to intervene as of right).

183 *See id.*

> intervention, a task *which is on its face impossible*. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation.[184]

The court noted the government's claim to represent the photographer's private interest is even more suspect because of "its reluctance in protecting the Owl, doing so only after [the photographer] threatened, and eventually brought, a law suit to force compliance with the Act."[185] The operative language here is "on its face impossible." The very fact that a private citizen can win a lawsuit against the government for improper administration of environmental laws means it is *impossible* for the government to adequately represent that citizen when the position is challenged. It is improper to give the government a presumption of adequate representation when prior litigation sets up a conflict of interest that makes representation impossible. Rather than a presumption with a high bar to jump over, the courts should return to the minimal burden analysis. Courts should grant intervention of right in cases such as *Coalition* with a minimum of fuss.

4. Political Realities Impact Administrative Policies

In 1983, the Ninth Circuit released a crucial decision concerning intervention on behalf of the government that exposes the folly behind the presumption. In *Sagebrush Rebellion, Inc. v. Watt*,[186] a conservative political organization sued to prevent establishment of a "birds of prey" preserve in Idaho.[187] Several environmental groups, including the National Audubon Society, sought to intervene.[188] The environmental groups had previously served as the motivating force behind the government's decision to establish the avian preserve.[189]

The timing of the suit and the involvement of James Watt made this case particularly interesting. In January 1981 the Reagan Administration took office, and President Reagan appointed James Watt as Secretary of the Interior over the strenuous opposition of environmental groups.[190] The same James Watt was a principal with the Mountain States Legal Organization, counsel for Sagebrush Rebellion.[191] The suit quickly received the "Watt v. Watt" nickname.[192] The court laid out the fundamental factors for adequacy of representation cases in the Ninth Circuit: 1) "whether the [existing party] will undoubtedly make all of the intervenor's arguments," 2) "whether the [existing party] is capable of and willing to make such arguments," and 3) "whether the intervenor offers a necessary element to the proceedings that would be neglected."[193] The Ninth Circuit

184 *Id.* at 845 (emphasis added).

185 *Id.*

186 713 F.2d 525 (9th Cir. 1983).

187 *Id.* at 526.

188 *Id.*

189 *Id.* at 526–27.

190 *See* Philip Shabecoff, *Environmentalists, Seeing Threat in White House Policy, Plan Fight*, N.Y. TIMES, Apr. 19, 1981, at 1; Bill Prochnau, *The Watt Controversy: 'Crusade' at Interior Apparently Is Causing Political Problems for President in the West*, WASH. POST, June 30, 1981, at A1.

191 *Sagebrush Rebellion*, 713 F.3d at 528.

192 *Id.*

193 *Id.*

recognized the environmental groups met the minimal burden for intervention given the political realities, although the court remarked, "[w]e are mindful that the mere change from one presidential administration to another, a recurrent event in our system of government, should not give rise to intervention as of right in ongoing lawsuits."[194] The court also rejected an argument by Sagebrush Rebellion that although Secretary Watt may personally not be aligned with the interests of the environmental groups, the nonpolitical United States Department of Justice (DOJ) represents the government.[195] The court struck a pragmatic tone, noting that the DOJ "will take an opposing view only when it believes an agency's position to be completely without merit."[196] *Sagebrush Rebellion* stands for the proposition that even when the federal government and environmental groups at least purportedly have the same objective—here to uphold a nature preserve—the political climate can force changes in governmental policy over time and influence whether the government will adequately represent a given interest.

In the early days of the George W. Bush Administration, the Tenth Circuit faced a case with political overtones reminiscent of *Sagebrush Rebellion.* President Clinton had previously issued a presidential proclamation establishing the Grand Staircase Escalante National Monument.[197] In *Utah Ass'n of Counties v. Clinton*,[198] several counties filed suit to invalidate the proclamation.[199] Environmental groups, led by the Southern Utah Wilderness Alliance (SUWA), moved to intervene.[200] The court recognized that while both the government and the environmental groups sought to sustain the creation of the monument, "[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor."[201] The court noted the political realities, reasoning "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts."[202] The court remanded to the district court with directions to grant SUWA's motion to intervene as a matter of right.[203]

The environmental movement in the United States has repeatedly been subject to changes of interpretation and enforcement between administrations. Without any change to the underlying environmental statutes, the priorities for enforcement were radically different between the Clinton and Bush Administrations.[204] The Ninth Circuit faced political realities in *Sagebrush Rebellion*, recognizing that an administrative priority shift in the Department of the Interior would necessarily lead the DOJ to shift positions. The shift in *Sagebrush Rebellion* was especially dramatic,

194 *Id.* at 528–29.
195 *Id.* at 529.
196 *Id.*
197 Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996).
198 255 F.3d 1246 (10th Cir. 2001).
199 *Id.* at 1248.
200 *Id.*
201 *Id.* at 1256.
202 *Id.*
203 *Id.*
204 *See, e.g.*, Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 363 (2004); Bruce Barcott, *Changing All the Rules*, N.Y. TIMES, Apr. 4, 2004, at 6.

with James Watt essentially moving from one side of the case to the other. While other situations may be less likely to have such a personal element, the polarized political climate in the United States can still lead to dramatic shifts. The *Clinton* case is a good example. The challenge to a presidential proclamation from the prior administration put the government on a potential collision course with environmental groups whose positions had been endorsed by the government only months before. The presumption should not operate to block environmental groups or other public interest groups from protecting their interests. While a change of administration should not automatically cause intervention requests to be granted, eliminating the presumption in favor of the minimal burden standard will allow groups a consistent right to be heard when future administrations make policy shifts.

5. Political Realities Impact Judicial Decisions

The standard for the right to intervene should not vary over time and across federal circuits based upon political ideology. The impact of politics on judicial decisions can be seen most dramatically in the Tenth Circuit. Changes in the makeup of the court driven by the George W. Bush Administration led to a dramatic en banc decision in 2007, sweeping aside precedent. In *San Juan County v. United States*,[205] a county in Utah sued to quiet title on land near Canyonlands National Park.[206] SUWA and other environmental groups moved to intervene.[207] The district court denied intervention, and on appeal a divided panel held SUWA was entitled to intervene as a matter of right.[208] The court granted an en banc review and ruled SUWA was not entitled to intervention of right because "it failed to overcome the presumption that its interest was adequately represented by the Federal Defendants."[209]

The adequate representation ruling in *San Juan County* is a departure from precedent for Tenth Circuit and will likely have far reaching effects. SUWA asserted that their narrow interest in limiting vehicular traffic near Canyonlands would not be adequately represented by the government, pointing to their ten-year battle to keep vehicular traffic out of the area.[210] The County argued that the government's only interest in the case was to defend title to the land, making the government's interest fully representative of SUWA's interest.[211]

The court referred to the minimal burden standard of *Trbovich* that it had "repeatedly adopted,"[212] and the reasoning from *Clinton* noting the government's need to "consider a broader spectrum of views."[213] The court ultimately rejected

205 503 F.3d 1163 (10th Cir. 2007) (en banc).

206 *Id.* at 1167.

207 *Id.*

208 *Id.*

209 *Id.*

210 *See* Appellants' Supplemental Reply Brief on Rehearing En Banc at 12–13, *San Juan County*, 503 F.3d 1163 (No. 04-4260) (describing a contentious relationship between SUWA and the United States Department of the Interior).

211 Supplemental Brief of Appellee San Juan County, Utah at 21, *San Juan County*, 503 F.3d 1163 (No. 04-4260).

212 *San Juan County*, 503 F.3d at 1204.

213 *Id.* (citing *Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001)).

that precedent, relying instead on a general presumption of adequate representation "when the objective of the applicant for intervention is identical to that of one of the parties."[214] The court looked back to *Hooker* and the opinion of Judge Friendly[215] and noted how Judge Friendly distinguished *Trbovich* on grounds that it applies only when there is at least something like conflicting statutory obligations—essentially the same reasoning that led to the denial of intervention by the First Circuit in *Maine*.[216] The court, in fact, called *Maine* "[p]erhaps the closest in point."[217] The court also pointed to the prior litigation that existed in *Maine*, reasoning that an "earlier adverse relationship with the government does not automatically make for a present adverse relationship."[218]

The *San Juan County* court held that only one issue was at stake in the case: "the existence or non-existence of a right-of-way and its length and its breadth."[219] On that narrow basis, the court found the interests of SUWA and the federal government to be identical.[220] The court distinguished *Coalition*, saying in that case the government had acted only after being forced to do so by litigation.[221] In this case SUWA and the government disagreed about the extent of protection needed in the wilderness area, but the government had acted without specific litigation by SUWA.[222] The court held that while the federal government may be more willing than SUWA to compromise over the land use terms, "nothing has indicated that they would do so by transferring an easement and the authority that goes with it."[223]

Judges Ebel, Briscoe, and Lucero filed a separate opinion, dissenting on the question of whether SUWA's interests would be adequately represented by the federal government.[224] The dissent cites a long line of Tenth Circuit cases, including *Coalition*, that hold "a government's representation of many broad interests precludes it from adequately representing an intervention applicant's more narrow and discrete interest."[225] The majority based their opinion on the premise that SUWA and the government had identical interests, and the dissent "d[id] not quarrel with the majority's statement that this presumption may apply when a governmental party possesses objectives that are identical to those of the intervention applicant."[226] The dissent argued that SUWA's interests were not identical to those of the government for two reasons: 1) this was a case concerning an easement, and will inevitably lead to a decision on the nature and scope of such an easement; and 2) the United States did not restrict vehicular traffic from the canyon until SUWA sued, with more than a decade elapsing before the United

214 *Id.* (citing City of Stillwell v. Ozarks Rural Elec. Coop. Corp., 79 F.3d 1038, 1042 (10th Cir. 1996)).

215 *See id.* at 1204–05 (summarizing the case and Judge Friendly's reasoning for why representation by the government would be adequate).

216 *See id.* at 1205–06 (citing *Hooker*, 749 F.2d 968, 987 (2d Cir. 1984)); *Maine*, 262 F.3d 19 (1st Cir. 2001)).

217 *Id.* at 1205.

218 *Id.* at 1206.

219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.* at 1206–07.

223 *Id.* at 1207.

224 *Id.* at 1226–27 (Ebel, J., concurring in part and dissenting in part).

225 *Id.* at 1227.

226 *Id.* at 1227 n.1.

States acted.[227] The prior litigation between the parties made the facts akin to *Coalition*, and the government further established an adverse position to SUWA by actively opposing intervention.[228] The dissent summed up their position by saying:

> Judges are not required to disregard reality. Based upon the historical hostility between the United States and SUWA concerning this canyon, one can easily conclude that there is a possibility that the United States will not adequately represent SUWA's interests relating to this property, interests that may be impaired by this litigation. That is all SUWA must establish.[229]

This shift in thinking shows that politics plays a role not only in administrative policy, but in the judicial system as well. In *Coalition*, the court held that a government agency seeking to represent the interest of the general public as well as a private individual faces a task that is "on its face impossible."[230] Just eleven years later, the court reversed itself and swept aside that precedent.[231] What changed in those eleven years? In 2001, three judges on the Tenth Circuit assumed senior status.[232] The Bush Administration appointed three judges to replace them.[233] Three more Bush Administration appointments followed in the 2003–2006 period.[234] A Reagan appointee rose to the Chief Judge position during the 2001–2007 period.[235] With similar shifts in the other federal circuits, more denials of intervention of right are likely. While the changing of the guard in the federal judiciary may lead to more decisions adverse to environmental issues, application of the presumption to deny environmental groups a right to protect their interests goes too far.

6. A Novel Approach Shows Potential but Fails to Protect Intervenors

In one of the most talked-about environmental cases of the 1990s, the Seventh Circuit and Judge Posner had an opportunity to consider the presumption. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, several citizens groups and villages moved to intervene on the side of the government to block the Solid Waste Agency of Northern Cook County's proposed landfill.[236] The court noted "the stumbling block for the would-be intervenors in this case is the requirement of proving inadequacy of representation by existing

227 *Id.* at 1228–30.

228 *Id.* at 1230.

229 *Id.* at 1231.

230 *Coalition*, 100 F.3d 837, 845 (10th Cir. 1996) (citing Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 384 (1977)).

231 *See San Juan County*, 503 F.3d at 1207.

232 Judges Bobby Ray Baldock, Wade Brorby, and Stephen H. Anderson assumed senior status. *See* The U.S. Court of Appeals for the Tenth Circuit, Tenth Circuit Judges, http://www.ca10.uscourts.gov/chambers/index.php (last visited Apr. 18, 2009).

233 President George W. Bush appointed Judges Harris L. Hartz, Terrence L. O'Brien, and Michael W. McConnell. *See id.*

234 President George W. Bush appointed Judges Timothy M. Tymkovich, Neil M. Gorsuch, and Jerome A. Holmes. *See id.*

235 Chief Judge Deanell Reece Tacha was appointed by President Reagan in 1985. *See id.*

236 *SWANCC*, 101 F.3d 503, 504 (7th Cir. 1996).

parties."[237] Judge Posner applied the presumption to block intervention, reasoning the "interests of the original party and of the intervenor are identical" and finding no evidence of foot-dragging by DOJ.[238] He instead proposed an innovative approach using a conditional application for leave to intervene. He suggested

> [t]he proper way to handle such an eventuality is for the would-be intervenor, when as here no present inadequacy of representation can be shown, to file at the outset of the case a standby or conditional application for leave to intervene and ask the district court to defer consideration of the question of adequacy of representation until the applicant is prepared to demonstrate inadequacy.[239]

On first blush this compromise idea seems to balance interests between the current parties, the intervenor, and the judicial system. In reality, by blocking intervenors until the government makes a clear move against their interests, it unnecessarily threatens legitimate interests and serves to delay the litigation even further. While the idea of a "conditional application" has received little support outside the Seventh Circuit, the Tenth Circuit in *San Juan County* threw a bone to SUWA by noting "if developments undermine the presumption . . . the matter may be revisited."[240] By forcing an intervenor to wait until the government proves inadequacy of representation through action, this compromise flaunts the "may be inadequate" and "minimal burden" touchstone ideas from *Trbovich*. When a would-be intervenor can meet the minimal burden, courts should not force the intervenor to lie in wait outside the litigation until "may be inadequate" turns to "actually inadequate."

7. Sixth Circuit Rejects Parens Patriae

In *Stupak-Thrall v. Glickman*,[241] the Sixth Circuit Court of Appeals unambiguously rejected the *parens patriae* doctrine.[242] The court denied an intervention request from environmental groups on timeliness grounds.[243] Although technically dicta, the court went on to address adequacy of representation and *parens patriae*, noting "this doctrine generally has no hold in this Circuit."[244] The court cited its decision in the groundbreaking affirmative action case, *Grutter v. Bollinger*.[245] The court's unqualified rejection of *parens patriae* recognizes the government's inability to act for all citizens in the modern administrative state. Other circuits should follow the Sixth Circuit's lead.

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237 *Id.* at 508.

238 *Id.*

239 *Id.* at 509.

240 *San Juan County*, 503 F.3d 1163, 1207 (10th Cir. 2007) (en banc).

241 226 F.3d 467 (6th Cir. 2000).

242 *Id.* at 479.

243 *Id.* at 472–75.

244 *Id.* at 479.

245 188 F.3d 394, 400 (6th Cir. 1999) (rejecting the idea of a higher standard of inadequacy when the government is involved); *see also Glickman*, 226 F.3d at 479.

VI. CONCLUSION

History shows the presumption of adequate representation by the government arose from sovereign governments acting on behalf of the their citizens in common law causes of action. The expansion of the *parens patriae* doctrine and its use to underpin the standard of adequate representation is based on a tenuous legal argument, grounded neither in the text of the Federal Rules of Civil Procedure nor in Supreme Court precedent. Application of the presumption in the modern administrative state of government regulation and enforcement leads to a bias toward allowing intervention to protect economic interests, and inconsistent jurisprudence for those intervening to protect environmental interests. The shifts in policy that accompany presidential administrations, especially in these times of polarized political thought, holds adequate representation hostage to the political winds. More ominously, the *San Juan County* decision shows the right to intervene to protect environmental interests is also held hostage to shifting political views on the court. This archaic common law doctrine has no place in today's modern administrative state. It's time to trash the presumption in favor of the minimal burden standard of *Trbovich*. All parties—environmental groups, business interests, and the federal judicial system—will benefit from a return to the spirit of a liberal intervention policy.