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Standing in the Government's Shoes—When Can an Intervenor Appeal a District Court Decision Invalidating a Federal Agency Action?

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Editors' Summary: Environmental controversies tend to involve multiple stakeholders with varied interests, which may lead to third-party intervention. This Article analyzes three alternative responses to the issue of whether and under what circumstances an intervenor can appeal a district court decision invalidating a federal agency action: the doctrine of rulemaking in the administrative state, the doctrine of prosecutorial discretion, and the doctrine of government control of litigation.

I. Introduction

The ability of outsiders to intervene in ongoing civil actions is well established in American jurisprudence. As the complexity of litigation has increased—due in part to the growth of public law litigation—the rules governing intervenors have evolved. Yet those rules have not kept pace with the increasing complexity of litigation; instead, at the present time, the rights and obligations of intervenors are uncertain. The purpose of this Article is to examine one area of uncertainty: whether and under what circumstances an intervenor can appeal a district court decision invalidating a federal agency action.

This relatively narrow issue is nevertheless critically important for a number of interrelated reasons. First, in the process of resolving the issue, courts will affect the rights and obligations of intervenors and thereby shape the doctrine of intervention. Intervention is a commonly employed legal device to join civil actions, particularly public law litigation that tends to affect multiple stakeholders. Second, courts will affect the scope of the standing doctrine. To an even greater extent than the doctrine of intervention, the standing doctrine impacts public law litigation because it functions as a hurdle that parties must overcome in order to proceed with a civil action (or appeal therefrom). Third, courts could affect the scope of the doctrine of investigatory and prosecutorial discretion. To the extent that this doctrine is applied broadly to render other government decisions nonreviewable, it could have significant, previously unexplored ramifications.

Furthermore, there are real circumstances in which this issue has arisen and will arise. For example, within the past two years, the issue was raised in motions to dismiss in *Association of American Physicians & Surgeons, Inc. v. U.S. Food & Drug Administration*,[1] and *Wyoming Outdoor Council v. Wyoming*.[2] The regulations at issue in these cases are hardly inconsequential. *Association of American Physicians* involved the so-called Pediatric Rule,[3] which would have required new drug manufacturers to test the safety and effectiveness of those drugs in children in order to obtain U.S. Food and Drug Administration approval to market them.[4] *Wyoming Outdoor Council* involves the so-called Roadless Rule,[5] which establishes prohibitions on road construction, road reconstruction, and timber harvesting in 58 million acres of National Forest System lands. The issue is likely to be particularly relevant to the development of environmental law. Controversies regarding environmental issues tend to involve multiple stakeholders with varied interests. In such circumstances, the likelihood that third parties will intervene in litigation are relatively high. For example, future litigation in which the issue of appeals by intervenors

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1. Nos. 02-5407 & 03-5055 (D.C. Cir. Dec. 11, 2003).
2. No. 03-5005 (10th Cir. Nov. 8, 2003). In the interests of full disclosure, I note that I formerly was an attorney at the U.S. Department of Justice where I represented the federal government in *Wyoming Outdoor Council v. Wyoming*. Needless to say, just as the views in this Article are not necessarily those of any organization with which I am affiliated, the views in the filings of the United States in that matter are not necessarily my own.
3. *See* 63 Fed. Reg. 66632 (Dec. 2, 1998).
4. The case was dismissed after the U.S. Congress passed and the president signed into law the Pediatric Research Equity Act, Pub. L. No. 108-155, which codifies the Pediatric Rule.
5. *See* 66 Fed. Reg. 3244 (Jan. 12, 2001).

could arise includes challenges to agency actions such as oil and gas leasing decisions of the Bureau of Land Management; limitations on snowmobiling in national parks; and regulation of air emissions by the U.S. Environmental Protection Agency (EPA).

In this Article, I describe and analyze three alternative responses to the issue of whether and under what circumstances an intervenor can appeal a district court decision invalidating a federal agency action. Each response is rooted in a distinct legal doctrine: (1) the doctrine of rulemaking in the administrative state; (2) the doctrine of prosecutorial discretion; and (3) the doctrine of government control of litigation. Based on the doctrine of rulemaking in the administrative state, the first response is that, as a general rule, when an intervenor can establish injury-in-fact stemming from the district court's judgment, causation, and redressability, i.e., Article III standing, that party can appeal a district court decision invalidating a federal regulation. Adoption of this doctrine would provide intervenors that can establish standing with the ability to maintain appeals independent of the federal government.

The second response, which is based on the doctrine of prosecutorial discretion, is that when the injury-in-fact identified by an intervenor to establish standing relates to the invocation of prosecutorial authority by the federal government, e.g., reversal of an enforcement order issued by a federal agency, that party cannot appeal a district court decision invalidating a federal agency action. Adoption of this doctrine would bar intervenors from maintaining appeals independent of the federal government where the injury alleged relates to the government's enforcement authority. These first two doctrines could be applied independent of one another, but they do not conflict and could also be applied in conjunction. If applied in conjunction, these doctrines would authorize intervenors to establish standing to maintain appeals independent of the federal government provided that the injury relied on to establish standing does not relate to the government's enforcement authority.

Based on the doctrine of government control of litigation, the third response is that, as a general rule, when the government decides to end litigation respecting a federal agency action by electing not to appeal an adverse lower court decision, a private party does not have standing to override that determination. This third doctrine conflicts with the doctrine of rulemaking in the administrative state and, if applied, it would eclipse the need for the doctrine of prosecutorial discretion. Adoption of this doctrine would bar intervenors from maintaining appeals independent of the federal government irrespective of whether those intervenors could otherwise establish standing.

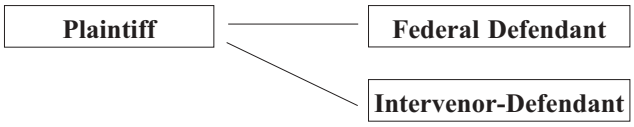
Part II of the Article provides a brief overview of intervention as a procedural device and its application to increasingly complex litigation, including public law litigation. Parts III and IV of the Article examine the U.S. Supreme Court's decision in *Diamond v. Charles*[6] and subsequent court of appeals case law interpreting that decision. Part V of the Article analyzes the alternative responses referenced above that are available to courts to determine when an intervenor can appeal a district court decision invalidating a federal agency action. Part VI contains concluding thoughts.

6. 476 U.S. 54 (1986).

II. Intervention in Federal Civil Practice

Intervention is a procedure whereby an outsider with an interest in a lawsuit may become a party even though she is not named by the existing litigants.[7] An outsider may intervene either as a plaintiff or defendant. This Article is concerned with outsiders that intervene on the side of the United States in order to defend a final agency action, that is, intervenor-defendants (see Figure 1).

Figure 1—Intervention to Defend a Federal Agency Action



In the district courts, intervention is governed by Rule 24 of the Federal Rules of Civil Procedure.[8] Rule 24 establishes two types of intervention—as of right and permissive—and sets forth the standards district courts are to apply to determine whether the outsider should be permitted to intervene.[9] When a district court grants a motion to intervene, the outsider becomes a party to the lawsuit.[10] But the Advisory Committee's Notes provide that an intervenor "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."[11]

Case law, in conjunction with the Advisory Committee's Notes, clearly establishes that the rights and obligations of intervenors are not necessarily identical to the rights and obligations of other parties.[12] In the leading scholarly treatment of the subject of intervention, Prof. David Shapiro argues that "[i]t is both feasible and desirable to break down the concept of intervention into a number of litigation rights and to conclude that a given person has one or some of these rights but not all."[13] But as a general matter, district courts fail to identify the rights and obligations of intervenors at the time intervention is granted. In fact, district courts often fail to specify whether the grant of intervention is permissive or as of right.[14] Whether an intervenor is permitted to conduct

7. *See* 7 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1901 (2d ed. 1986).

8. *See* Fed. R. Civ. P. 24.

9. *See id.* Whereas intervention as of right must be granted by courts when the proposed intervenor has met requirements specified in Rule 24, permissive intervention may be granted or denied at the discretion of the courts.

10. *See* Karcher v. May, 484 U.S. 72, 77 (1987) ("One who is not an original party to a lawsuit may of course become a party by intervention, substitution, or third-party practice.").

11. *See* Fed. R. Civ. P. 24 advisory committee's notes.

12. *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 Wash. U. L.Q. 215, 278 (2000) ("more and more courts have granted limited forms of intervention").

13. David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 727 (1968).

14. Diamond v. Charles, 476 U.S. 54, 58 (1986) (stating that the district court did not indicate whether intervention was permissive or as of right); *see also* Wright & Miller, *supra* note 7, §1902 ("it is not at all uncommon for a court to hold that intervention will be allowed without specifying which branch of the rule it considers to be on point").

discovery, cross-examine witnesses, participate in settlement discussions, or appeal a final judgment are issues that district courts typically address when they arise. Thus, the rights and obligations of intervenors often are uncertain.

This uncertainty may be particularly troubling where intervenors are barred from appealing a final judgment yet bound by that judgment. The rights of intervenors should be concomitant with the obligations they must bear. It would violate the Due Process Clause[15] to bar appeal by an intervenor and, at the same time, hold that the intervenor is bound by a lower court judgment and subject to the doctrines of issue and claim preclusion.[16] For the sake of fairness and judicial economy, the rights and obligations should be ascertainable at the time intervention is granted; parties should not be required to engage in litigation to identify them.[17]

III. *Diamond*

Historically, the Court's jurisprudence with respect to the right of an intervenor to appeal has been somewhat uneven. For example, in *Union Stock Yard & Transit Co. of Chicago v. United States (Chicago Junction)*,[18] the Court held that an intervenor in an administrative proceeding before the Interstate Commerce Commission (ICC) becomes a party to the proceeding entitled to the same rights as any other party, including the right to challenge the outcome of the proceeding.[19] In *Boston Tow Boat Co. v. United States*,[20] the Court held that an intervenor in an administrative proceeding before the ICC did not have an independent right to appeal.[21] The apparent inconsistency of past decisions was resolved to some extent when the Court decided *Diamond*.

Diamond involved a class action challenge by a group of physicians to an Illinois law respecting abortion.[22] Shortly after the filing of the complaint, Eugene Diamond moved to intervene, and, over the objections of the then-plaintiffs, the motion was granted.[23] The lower court permanently enjoined certain sections of the Illinois law and the U.S. Court of Appeals for the Seventh Circuit affirmed.[24] The state did not seek Court review but Diamond attempted to do so.[25]

The threshold inquiry undertaken by the Court was whether Diamond could seek further review in the absence of the state. The first of two rules announced by the Court in *Diamond* is that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."[26]

The second rule announced by the Court in *Diamond* is that "[b]ecause the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, 405 U.S. at 740 . . . in defending the standards embodied in that code."[27] The Court went on to imply that there may be exceptions to this second rule,[28] but concluded that Diamond could not establish standing because he could not establish injury-in-fact.

The Court identified two interrelated yet distinct bases for the general rule that an intervenor cannot defend state law in federal appellate proceedings in the event the state chooses not to do so. First, the Court held that "concerns for state autonomy" are directly applicable "to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made."[29] This is consistent with jurisprudence establishing that the executive possesses broad investigatory and prosecutorial discretion.[30] Diamond claimed that his interest in enforcement of the state law permitted him to defend that law on appeal absent the state.[31] The Court rejected this claim, and, in so doing, affirmed that Diamond could not compel the state to take enforcement action.[32]

Second, the Court held that "the power to create and enforce a legal code . . . is one of the quintessential functions of

15. U.S. Const. amend. V.

16. At least one scholar has argued that "[a]n intervenor that cannot appeal is not bound by the judgment entered below." Appel, *supra* note 12, at 278. Such a rule would allay due process concerns.

17. The counterargument is that forcing courts to specify the rights and obligations of intervenors at the time intervention is granted undermines the principle of judicial economy, because for example, the parties may subsequently settle the case. This counterargument is unpersuasive because as a general matter: (1) the lower courts are in a better position to establish the rights and obligations of intervenors due to their familiarity with the underlying parties and facts; and (2) the likelihood of settlement is greater when the rights and obligations of the parties are more clearly specified.

18. 264 U.S. 258 (1924).

19. *Id.* at 267-69. *Accord* Federal Communications Comm'n v. National Broad. Co., 319 U.S. 239, 246-47 (1943).

20. 321 U.S. 632 (1944).

21. *Id.* at 633-34.

22. *Diamond*, 476 U.S. at 56.

23. *Id.* at 58.

24. *Id.* at 61.

25. *Id.*

26. *Id.* at 68. *Accord* Arizonans for Official English v. Arizona, 520 U.S. 43, 64-65 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance . . . . An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III." (quotation marks and citations omitted)). *Compare* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 376 (1987) (stating, without reference to *Diamond*, that "[a]n intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court"). Under Article III, §2 of the U.S. Constitution, the judicial power extends to cases and controversies. "Standing to sue or defend is an aspect of the case-or-controversy requirement." *Arizonans for Official English*, 520 U.S. at 64. The contemporary criteria used by the Court to determine whether a party has standing were articulated in *Defenders of Wildlife v. Lujan*, 504 U.S. 555, 22 ELR 20913 (1992). The three-part test established by the Court is: (1) did the plaintiff suffer an injury-in-fact?; (2) is there a causal connection between the injury and the conduct complained of?; and (3) is it likely that the injury will be redressed by a favorable decision? *Id.* at 560-61. *Accord* Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 30 ELR 20246 (2000); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-03, 28 ELR 20434 (1998). The Court did not reach the issue of whether an outsider must establish standing to intervene in district court; instead, the Court simply acknowledged that the courts of appeals are split on that issue. *Diamond*, 476 U.S. at 68-69.

27. *Diamond*, 476 U.S. at 65.

28. *See id.* ("Even if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute, this is not one of them." (footnote omitted)).

29. *Id.* at 65.

30. *See*, *e.g.*, Heckler v. Chaney, 470 U.S. 821, 828, 15 ELR 20335 (1985). *Cf.* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution").

31. *Diamond*, 476 U.S. at 64 ("Diamond claims that his interests in enforcement permit him to defend the Abortion Law, despite Illinois' acquiescence in the Court of Appeals' ruling on unconstitutionality.").

32. *See id.*

a State."[33] States are sovereigns in our federal system, and, when acting in their sovereign capacity, they occupy a position different from other parties.[34] The exercise of sovereign power over individuals and entities within their jurisdiction, which includes authority to enact and enforce laws, is among the actions states undertake in their sovereign capacity.[35] Therefore, concerns about state sovereignty, that is, the "autonomy of states" to enact and enforce laws, provided a second basis for the rule that an intervenor cannot defend state law in federal appellate proceedings in the event the state chooses not to do so.[36]

IV. Post-*Diamond* Courts of Appeals' Decisions Respecting the Ability of Intervenors to Defend a Federal or State Law or Regulation

Many of the courts of appeals have applied the rules enunciated by the Court in *Diamond* subsequent to that decision. The first rule—that an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that she fulfills the requirements of Article III—has been followed consistently in the courts of appeals.[37] There is a single case in which the court of appeals does not appear to have followed *Diamond*,[38] but there the standing of the intervenors to appeal a district court decision enjoining a federal regulation absent the federal defendant apparently went unaddressed. Thus, no court of appeals expressly declined to follow the first rule set forth in *Diamond*.

Furthermore, the numerous courts of appeals that have followed the first rule in *Diamond* have applied it in cases involving underlying challenges to state law, i.e., *Sea Shore Corp. v. Sullivan*,[39] *Schulz v. Williams*,[40] *Associated Builders & Contractors v. Perry*,[41] federal regulations, i.e., *Kootenai Tribe of Idaho v. Veneman*,[42] *Mausolf v. Babbitt*,[43] *Idaho Farm Bureau v. Babbitt*,[44] *Didrickson v. U.S. Department of the Interior*,[45] and a consent decree entered pursuant to federal law, i.e., *United States v. AVX Corp*.[46] Application of the first rule in cases involving underlying challenges to both state and federal law and regulations is sensible because the standing analysis is identical in both types of litigation.

The second rule—that under the circumstances present in *Diamond* only a state has authority to defend its laws—has also been followed consistently in the courts of appeals. No court of appeals has interpreted the second rule in *Diamond* as a complete prohibition upon appeals by intervenors where the government itself declines to appeal. In fact, the only court of appeals to expressly consider that interpretation rejected it.[47] This interpretation of the second rule is consistent with the rule, as well as its underlying bases, i.e., concerns that the intervenors not tread upon the enforcement discretion of the government or the sovereignty of the states, as described by the Court.

Thus, in *Associated Builders & Contractors*,[48] the U.S. Court of Appeals for the Sixth Circuit held that an intervenor was unable to appeal the order of a district court instructing Michigan to refrain from enforcing a state law because that law was preempted. The intervenor claimed its interests in the enforcement of the state law at issue confer standing.[49] The court found that the intervenor "seeks to require the State of Michigan to enforce its own statute" and went on to hold that the potential intervenor "lacks standing to prosecute this appeal."[50] The court of appeals also concluded that "the state cannot be compelled by a citizen to exercise its sovereign powers."[51] The decision, therefore, is entirely consistent with the underlying bases of the rule, that is, concerns about enforcement discretion and state sovereignty.

33. *Id*. at 65 (quotation marks and citation omitted).
34. Powers not delegated to the federal government by the Constitution are reserved to the states. U.S. Const. amend. X.
35. *See* Snapp v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982), quoted by *Diamond*, 476 U.S. at 65. *Cf.* American Banana Co. v. American Fruit Co., 213 U.S. 347, 358 (1909) ("The very meaning of sovereignty is that the decree of the sovereign makes law.").
36. Concerns about the autonomy of states do not extend to the federal government because review is occurring in federal courts and whereas federal courts are well-equipped to assess federal regulations and procedures, "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).
37. *See* Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1109, 33 ELR 20130 (9th Cir. 2002) (considering, as a threshold matter, "whether intervenors have Article III standing to pursue this appeal . . . without the government as an appellant"); Sea Shore Corp. v. Sullivan, 158 F.3d 51, 55 (1st Cir. 1998) ("As an intervenor seeking singlehandedly to appeal, the [intervenor] must independently pass the test of Article III standing."); Mausolf v. Babbitt, 125 F.3d 661, 26 ELR 21317 (8th Cir. 1997) ("an intervenor may not appeal, or continue a suit, without the party on whose side intervention was permitted, unless [the] intervenor has Article III standing" (quotation marks and citation omitted)); Idaho Farm Bureau v. Babbitt, 58 F.3d 1392, 1398, 24 ELR 20194 (9th Cir. 1995) ("Absent appeal by [a federal agency], the intervenors must have standing in order to pursue this appeal."); Schulz v. Williams, 44 F.3d 48, 52 (2d Cir. 1994) ("To maintain standing [to pursue an appeal], the intervenor must satisfy the well-established requisites of Article III." (citation omitted)); Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994) ("an intervenor seeking to appeal must have standing under Article III of the Constitution . . ."); Didrickson v. Department of the Interior, 982 F.2d 1332, 1338 (9th Cir. 1992) (An intervenor who pursues appeal absent appeal by the party on whose side the intervenor intervened "must satisfy the requirements or Article III."); United States v. AVX Corp., 962 F.2d 108, 112 (1st Cir. 1992) ("In language of unmistakable clarity, Justice Blackmun wrote [in Diamond] that 'an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.'" (citation omitted)).
38. *See* National Wildlife Fed'n v. Lujan, 928 F.2d 453, 21 ELR 20684 (D.C. Cir. 1991).
39. 158 F.3d 51 (1st Cir. 1998).
40. 44 F.3d 48 (2d Cir. 1994).
41. 16 F.3d 688 (6th Cir. 1994).
42. 313 F.3d 1094, 33 ELR 20130 (9th Cir. 2002).
43. 125 F.3d 661, 26 ELR 21317 (8th Cir. 1997).
44. 58 F.3d 1392, 24 ELR 20194 (9th Cir. 1995).
45. 982 F.2d 1332 (9th Cir. 1992).
46. 962 F.2d 108 (1st Cir. 1992).
47. *See Sea Shore Corp.*, 158 F.3d at 58 (rejecting the principle that "a private party can never appeal the determination that a state statute is unconstitutional if the state declines the appeal"); *see also Associated Builders & Contractors*, 16 F.3d at 694 (Merritt, J., concurring) ("I do not read *Diamond* to establish the rule that no private party intervenor can have standing to pursue an appeal that an original state party declines to bring . . ."). *Cf.* Kendall-Jackson Winery, Ltd. v. Branson, 212 F.3d 995, 997 (7th Cir. 2000) ("a choice by a public body not to appeal from an adverse decision *may* doom any effort by private litigants to obtain review of the judgment" (emphasis added)).
48. 16 F.3d at 690-91.
49. *See id*. at 691.
50. *Id*.
51. *Id*. at 693.

Similarly, in *Kendall-Jackson Winery, Ltd. v. Branson*,[52] the Seventh Circuit held that intervenors were unable to appeal the order of a district court enjoining the Illinois Liquor Control Commission from enforcing an Illinois law and enforcing orders issued under that law because the law violated the Contracts Clause and the Commerce Clause. The intervenors claimed that the Seventh Circuit could remove the injunction by applying abstention doctrines, but the court held that abstention is designed for the state's benefit and the court need not consider arguments based on abstention made by private parties where such arguments were not advanced by the state.[53] The intervenors also claimed that the district court injunction injured them by depriving them of the benefits of enforcement actions taken by the Illinois Liquor Control Commission.[54] But the Seventh Circuit noted that "Illinois does not recognize any private right of action to contest . . . an enforcement decision by the Commission," and cited *Heckler v. Chaney*[55] in support of its decision not to permit the intervenors indirectly to challenge state enforcement decisions.[56] Thus, when it held that intervenors could not appeal, the court of appeals demonstrated concern about state sovereignty and enforcement discretion consistent with the underlying bases of the rule.[57]

The only other court of appeals to apply the second rule permitted an intervenor to appeal from a district court decision enjoining enforcement of an order that closed off portions of a national park to snowmobiles.[58] In *Mausolf*, the U.S. Court of Appeals for the Eighth Circuit noted that *Diamond* required an intervenor to establish standing in order to appeal and that in an earlier proceeding it determined that the intervenor possesses Article III standing.[59] The Eighth Circuit then rejected the argument of the plaintiff below that the intervenor was seeking to enforce the regulations.[60] The interest espoused by the intervenor to establish standing and accepted by the Eighth Circuit was not an interest in enforcement of the order but an interest in "observing and enjoying Park wildlife . . . without the potential interference of snowmobiles."[61] The court concluded that the government had not revoked the order and a decision to uphold the order would likely benefit the intervenor.[62] The underlying bases for the second rule apparently did not justify a decision to bar appeal in *Mausolf*.

52. 212 F.3d 995, 996-97 (7th Cir. 2000).
53. *See id*. at 997-98.
54. *See id*. at 998.
55. 470 U.S. 821, 15 ELR 20335 (1985).
56. 212 F.3d at 998.
57. The Seventh Circuit contrasted *Kendall-Jackson Winery, Ltd.* with *Mausolf*. The court held that

> [p]rivate parties that had intervened in [*Mausolf*] sensibly were allowed to appeal, not simply because the injunction injured them . . . but because federal regulations may be enforced by private parties by suits against the agencies (under the Administrative Procedure Act) and by suits against private parties under the federal question jurisdiction to the extent a statute or regulation creates a private right of action, or under 42 U.S.C. §1983 to the extent the defendant is a state actor.

Id.

58. 125 F.3d at 665-67.
59. *See id*. at 666-67.
60. *See id*. at 667 ("contrary to [plaintiff's] assertions, the [intervenor] is not seeking to 'enforce' the lakeshore closures").
61. *Id*.
62. *See id*.

V. Three Responses to the Issue

Diamond and its progeny in the courts of appeals establish with a high degree of certainty that an intervenor's right to appeal a decision invalidating a federal agency action is, at a minimum, contingent upon a showing by the intervenor that she fulfills the requirements of Article III. But there is substantially less certainty regarding the other relevant considerations when determining whether and under what circumstances an intervenor can appeal a district court decision invalidating a federal agency action. There are three possible responses to this issue that courts may employ; each is based on a distinct legal doctrine.

A. Appeal Governed by the Doctrine of Rulemaking in the Administrative State

Rulemaking by the federal government is governed by the Administrative Procedure Act (APA).[63] The APA has been likened to the U.S. Constitution for the administrative state.[64] It sets "a pattern designed to achieve relative uniformity in the administrative machinery of the federal government."[65] The APA provides a framework for agency action. Among other things, the APA sets forth a procedure that federal agencies are required to follow when promulgating, amending, or repealing regulations.[66] The APA also establishes that regulations promulgated, amended, or repealed pursuant thereto are subject to judicial review and specifies the standard of review to be applied by courts.[67]

Regulations promulgated pursuant to the APA have the force of law[68]; therefore, such regulations set legal rights

63. 5 U.S.C. §§551-706, *available in* ELR Stat. Admin Proc.
64. *See* Richard J. Pierce, Administrative Law Treatise §1.1 (4th ed. 2002); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 253, 253 (1986).
65. Attorney General's Manual on the Administrative Procedure Act 5 (1947); *see also* Cornelius M. Kerwin, Rulemaking 3 (1994) (The APA "was written by Congress to bring regularity and predictability to the decisionmaking processes of government agencies . . .").
66. *See* 5 U.S.C. §553. The APA defines rulemaking as "agency processes for formulating, amending, or repealing a rule." *See* 5 U.S.C. §551(5). Therefore, the amendment and repeal of regulations, like the promulgation of regulations in the first instance, are subject to the procedures set forth at 5 U.S.C. §553, including notice and an opportunity to comment. These procedures further the goals of open and informed decisionmaking by the federal government.
67. *See* 5 U.S.C. §§702, 706 (regarding the scope and standard of judicial review); *see also* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 Duke L.J. 387, 431 (arguing that "[t]he APA exceptions to the availability of judicial review should be construed narrowly"). With respect to judicial review of an agency decision to amend or repeal a regulation, see Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Ins. Co., 463 U.S. 26, 41-42, 13 ELR 20672 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change . . ."); Natural Resources Defense Council v. EPA, 683 F.2d 752, 759-60, 12 ELR 20833 (3d Cir. 1982). Judicial review of agency actions is not without critics. *See, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 Va. L. Rev. 1243 (1999).
68. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation

and obligations. In accordance with the doctrine of rulemaking in the administrative state, those to whom rights accrue have a legal interest in regulations wholly independent of the interest of the government.[69] This legal interest is sufficient to establish standing to defend regulations on appeal when the government chooses not to do so. This is the case because an order enjoining application of the regulations, like an administrative action repealing such regulations, results in injury-in-fact to entities with a legal interest in the regulations.[70] And it is not realistic to expect the government adequately to represent the rights of entities with a legal interest in regulations.[71]

Rejecting the doctrine of rulemaking in the administrative state and barring appeal by intervenors where the government elects not to appeal a decision invalidating a federal regulation arguably undermines the statutory structure the U.S. Congress established more than 50 years ago when it enacted the APA.[72] A rule barring appeal by intervenors would permit the executive branch to bypass the APA's rulemaking requirements,[73] and leave parties otherwise able to establish standing with no recourse to remedy a legal wrong. In contrast, adopting the doctrine of rulemaking in the administrative state and permitting appeal by intervenors where the government elects not to appeal a decision invalidating a federal regulation does not in any way impinge on the government's authority either: (1) to file a notice of appeal; or (2) to amend or repeal the regulation.[74] Under this doctrine, the federal government retains complete control over the decision whether to appeal from an adverse decision enjoining a federal regulation and whether (and when) to amend or repeal a regulation.[75]

B. Appeal Governed by the Doctrine of Prosecutorial Discretion

Prosecutorial discretion is a doctrine with a long history.[76] In the words of the Court, it is the doctrine that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[77] The doctrine "is attributable in no small part to the general unsuitability for judicial

that should underlie a pronouncement of such force."); Standard Oil v. Johnson, 316 U.S. 481, 484 (1942) (indicating that "regulations have the force of law"). *Compare* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002) (arguing that not all grants of rulemaking authority empower agencies to promulgate rules that have the force of law and that it is important to distinguish between legislative rules, which have the force of law, and housekeeping rules, which do not).

69. *Cf.* Military Toxics Project v. EPA, 146 F.3d 948, 954, 28 ELR 21350 (D.C. Cir. 1998) (stating that a party that benefits from a regulation and is subject thereto has standing to intervene to defend the regulation in its own right). The APA specifically provides interested persons with "the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. §553(e). Furthermore, decisions made with respect to such petitions are subject to judicial review. *Id.* §§702, 704. Provided such persons are able to establish Article III standing, they can establish an interest in defending the rule. Even persons who did not petition for the issuance of regulations likely could establish an interest in defending regulations in certain circumstances. For example, a party that is awarded compensation (such as unemployment, disability, or social security benefits) under a regulation that is subject to judicial review would certainly have a direct stake in defending the regulations if that party could otherwise establish standing. Noneconomic injury, like the economic injury described in the previous sentence, may be sufficient to establish standing. *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153-54 (1970).

70. *See* National Wildlife Fed'n v. Lujan, 928 F.2d 453, 456 n.2 (D.C. Cir. 1991) (stating, in a matter in which the intervenor appealed an adverse decision but the government did not, that "because the Secretary has not promulgated a new regulation . . . Industry could benefit from an appellate decision reversing the district court's interpretation of the Act and upholding the current regulation"). *Accord* Mausolf v. Babbitt, 125 F.3d 661, 667, 26 ELR 21317 (8th Cir. 1997).

71. *Cf.* South Dakota v. Ubbelohde, 330 F.3d 1014, 1025, 33 ELR 20213 (8th Cir. 2003) ("the government must represent the interests of all of its citizens, which often requires the government to weigh competing interests and favor one interest over another"); Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1255 (10th Cir. 2001) ("the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation"); Stupak-Thrall v. Glickman, 223 F.3d 467, 479, 27 ELR 20001 (6th Cir. 2000) (citing Grutter v. Bollinger, 188 F.3d 394, 397-98 (6th Cir. 1999)) (rejecting the argument that when the government is a party to a lawsuit it is presumed to represent the interests of all citizens).

72. The statutory structure is premised upon the notion of an administrative state in which a cadre of professional, career civil servants promulgate regulations to implement laws enacted by Congress and the president. *See* WALTER GELHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 7-8 (1941) ("[A]dministrative agencies have been devised to concentrate their attention upon phases of work somewhat alien to the basic functions of courts and legislatures. And from their concentration have developed the special knowledge and special skills which characterize the administrative process at its best."). *Cf.* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887) (extolling the virtues of a professional public administration). But this notion has been rejected by some scholars who contend that it is more accurate to characterize regulations as political, discretionary, and incremental than as ministerial and reasoned. *See*, *e.g.*, Martin Shapiro, *APA: Past, Present, and Future*, 72 VA. L. REV. 447, 491 (1986). *Cf.* Herbert Simon, *The Proverbs of Administration*, 6 PUB. ADMIN. REV. 53 (1946) (indicating that the prevailing arguments in favor of public administration are flawed).

73. As mentioned above, *see supra* note 66 and accompanying text, the APA imposes notice-and-comment requirements on agencies that are engaged in the promulgation, amendment, and *repeal* of regulations. There is a risk that a rule barring appeal would allow a federal agency that does not approve of a regulation to litigate the validity of that regulation, lose in district court, and effectively repeal the litigation without complying with notice and rulemaking requirements. There are at least two incentives an agency to do so: it need not comply with notice-and-comment requirements that subject its decision to public scrutiny and it can use the adverse district court decision as cover.

74. The authority to file a notice of appeal is vested in the Solicitor General, *see* 28 U.S.C. §518(b); 28 C.F.R. §0.20(b), and, while the decision itself is public, the process whereby the decision is made is not. Furthermore, the Solicitor General's decision is unreviewable. By comparison, the authority to amend or repeal a regulation is made by the relevant Cabinet secretary or the person within the department to whom the Secretary has delegated such authority. The process of amending or repealing regulations is governed by the APA and includes notice and an opportunity to comment. *See* 5 U.S.C. §§551(5), 553. In addition, such agency actions are subject to judicial review. *See id.* §706(2)(A).

75. One critical response to this assertion is that the federal government loses a degree of control. For example, the federal government may elect not to appeal a particular adverse decision respecting a regulation because it is concerned about the composition of the court of appeals that would hear the appeal in that case. Under the doctrine of rulemaking in the administrative state an intervenor could appeal so that the court of appeals would hear the appeal.

76. Kenneth Culp Davis, *No Law to Apply*, 25 SAN DIEGO L. REV. 1, 6-9 (1988). *Compare* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14-22 (1994) (indicating that history demonstrates that the power to prosecute has not always been entirely within the domain of the president); *see also* Morrison v. Olson, 487 U.S. 654 (1988) (in which the Court upheld the ability of Congress to create an Independent Counsel to investigate and prosecute crimes by senior executive officials).

77. Heckler v. Chaney, 470 U.S. 821, 831, 15 ELR 20335 (1985).

review of agency decisions to refuse enforcement."[78] The rationale underlying this doctrine is: (1) such decisions are not well suited for judicial review because they involve complicated balancing of numerous factors, e.g., enforcement resources available, likelihood of success, fit between specific action and overall policies; (2) when an agency fails to act, it generally does not exercise its coercive power; (3) whereas agency action provides a focus for review, no such focus exists in instances of inaction; and (4) the refusal of an agency to institute proceedings is akin to the refusal of a prosecutor to indict, "which has long been regarded as the special province of the Executive Branch."[79]

In the context of this Article, the doctrine of prosecutorial discretion provides that when the injury-in-fact identified by an intervenor to establish standing relates to the invocation of prosecutorial authority by the federal government, e.g., reversal of an enforcement order issued by a federal agency, that party cannot appeal a district court decision invalidating a federal agency action. In other words, the failure of the federal government to enforce (or to appeal from an adverse district court decision respecting an enforcement action) generally is not a basis to establish injury-in-fact.[80] This doctrine is consistent with the Court's statement in *Diamond* that "concerns for state autonomy . . . deny private individuals the right to compel a State to enforce its laws."[81] It also finds support elsewhere in Court jurisprudence.[82]

At the same time, legal scholars have concluded that the breadth of the holding in *Chaney* is limited and that there are reasons to question its underpinnings. For example, Prof. Cass Sunstein wrote that "the *Chaney* Court's invocation of prosecutorial discretion does not justify the adoption of a presumption against review."[83] Prof. Kenneth Davis agreed, writing that "the extreme *Chaney* view will not long endure," and indicating that federal courts should exercise their judicial discretion where, as in *Chaney*, they determine that there is no law to apply.[84] The *Chaney* decision itself specifies certain limits upon the presumption contained therein.[85]

C. Appeal Governed by the Doctrine of Government Control of Litigation

A final response to the issue of whether and under what circumstances an intervenor can appeal a district court decision invalidating a federal agency action is that appeal should be barred where the government elects not to appeal the decision.[86] This response, based on the doctrine of government control of litigation, is rooted in Article II, §3 of the Constitution, which charges the president with the duty to "take Care that the Laws be faithfully executed."[87] This clause may be interpreted as both a charge and a grant of authority to the executive branch *alone* to execute the laws.[88] To the extent that outside parties are able to intervene in litigation in which the federal government is a defendant and maintain such litigation when the executive branch has elected to end it, those parties (and the judiciary) arguably are treading upon executive branch prerogatives.

There are policy bases for the doctrine of government control of litigation. The application of the doctrine empowers the executive vis-à-vis the judiciary. Such an arrangement may be favored because agencies have subject-matter expertise that judges—who are necessarily generalists within our system of government—lack.[89] And whereas agencies are controlled (albeit to varying degrees) by the president, scholars have argued that agencies have

78. *Id.*

79. *See id.* at 831-32. The Court indicated that the presumption against judicial review of agency enforcement decisions may be overcome in certain circumstances. *See id.* at 832-33 ("we emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers"). *Cf.* National Wildlife Fed'n v. EPA, 980 F.2d 765, 772-74, 23 ELR 20440 (D.C. Cir. 1992) (in which the D.C. Circuit reviewed on the merits a facial challenge to EPA regulations that provide the agency discretion to refuse to initiate proceedings to withdraw a state's enforcement responsibility for drinking water standards under the Safe Drinking Water Act after EPA has formally determined that the state no longer meets requirements).

80. The rule established by this doctrine may be overcome, and injury-in-fact may be demonstrated, where a statute has circumscribed an agency's enforcement powers. *See supra* note 73. It is conceivable that a party could establish injury-in-fact under the test set forth in Defenders of Wildlife v. Lujan, 504 U.S. 555, 560, 22 ELR 20913 (1992) (that is injury that is both "concrete and particularized" and "actual or imminent"), and nevertheless be barred from seeking a remedy for the injury in federal court due to the application of this doctrine. For example, an intervenor-party could show that failure to bring an enforcement action against its competitor gives that party a competitive economic advantage that will reduce the market share of the intervenor-party. Such a showing may be sufficient to establish an injury that is concrete and imminent, but is insufficient to overcome the jurisdictional bar established by the doctrine of prosecutorial discretion.

81. *Diamond*, 476 U.S. at 65.

82. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 137 (1986) (stating that "private parties, and perhaps even separate sovereigns, have no legally cognizable interest in the prosecutorial decisions of the Federal Government").

83. Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 665 (1985).

84. Davis, *supra* note 76, at 25. More than 15 years later, it is difficult to imagine that the Court will revisit its position in *Chaney* anytime soon, but time will tell.

85. *See*, *e.g.*, *supra* note 79 (citing *Heckler*, 470 U.S. at 832-33); *see also Heckler*, 470 U.S. at 825 n.2 (indicating that the presumption of nonreviewability does not necessarily extend to "agency discretion not to invoke rulemaking proceedings"); *see also* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1197 (1982) (indicating that while agency decisions to enforce against third parties were generally immune from judicial review under the traditional model of administrative law, courts have increasingly required agencies to enforce regulatory statutes).

86. This response is the view that the United States has taken in recent cases presenting the issue. *See, e.g.*, Brief for the United States as Amicus Curiae, Association of American Physicians & Surgeons, *supra* note 1; Brief for the United States as Amicus Curiae, Wyoming Outdoor Council, *supra* note 2.

87. U.S. Const. art. II, §3, cl. 4.

88. *See* Lessig & Sunstein, *supra* note 76, at 1, 10 (1994) (indicating that the Take Care Clause is both a duty and a power); 1 Laurence H. Tribe, American Constitutional Law 717 (3d ed. 2000) (indicating that the Take Care Clause provides the president with both a power and a duty). With respect to the vesting of authority in the executive alone to enforce the laws, see Stewart & Sunstein, *supra* note 85, at 1201-02 (indicating that "there are hazards in giving public authorities a monopoly on the enforcement process" and recommending "private review of public enforcement").

89. Agencies cannot be omniscient but Professor Shapiro has argued that there is an expectation that agencies will be omniscient. The perpetual failure of synoptic decisionmaking by agencies has led to increased judicial oversight, but Professor Shapiro and others have questioned the wisdom and legitimacy of such oversight. *See*, *e.g.*, Martin Shapiro, Who Guards the Guardians? Judicial Control of Administration (Univ. Georgia Press 1988).

democratic legitimacy and accountability that the judiciary lacks.[90]

In addition, *Diamond* may be read to support this doctrine. Specifically, in *Diamond* the Court stated that "[b]ecause the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, 405 U.S. at 740 . . . in defending the standards embodied in that code."[91] Arguably, the doctrine of government control of litigation is simply an extension of *Diamond*'s holding from state laws to federal laws.[92]

Furthermore, Congress has specifically provided that "the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General,"[93] and that "the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party."[94] The U.S. Attorney General, in turn, has delegated to the U.S. Solicitor General the function of "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts."[95] The Solicitor General's determinations regarding whether to initiate, continue, or terminate litigation for the United States are discretionary decisions that—according to the doctrine of government control of litigation—are not susceptible to judicial review.

The Court has protected the Solicitor General's exclusive role in the analogous context of deciding whether to seek certiorari. For example, in *Federal Election Commission v. NRA Political Victory Fund*,[96] the Court made the following statement: "Whether review of a decision adverse to the Government in a court of appeals should be sought depends on a number of factors which do not lend themselves to easy categorization. The Government as a whole is apt to fare better if these decisions are concentrated in a single official."[97] This reasoning arguably lends support to the doctrine of government control of litigation.

One criticism of this doctrine is that intervenors are not impinging on the prerogatives of the federal government but instead are seeking to protect their own legally cognizable rights.[98] Intervenors that pursue appeal are alleging that an error by the lower court resulted in a decision that is inconsistent with law or fact and seeking reversal of that lower court decision. If successful, such an appeal would return the federal government and other parties to the status quo immediately preceding the litigation. While it is the case that appeal by the intervenor does impinge to some extent upon the ability of the government to control litigation, that fact alone may be insufficient to support the argument that the intervenor should be barred from appealing an adverse decision.

90. *See*, *e.g.*, Richard Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 Tex. L. Rev. 469, 505-06 (1985).

91. *Diamond*, 476 U.S. at 65.

92. *But see supra* note 36 (explaining that there are bases to distinguish state and federal laws in this context).

93. 28 U.S.C. §519.

94. *Id.* §519.

95. 28 C.F.R. §0.20(b).

96. 513 U.S. 88, 96 (1994).

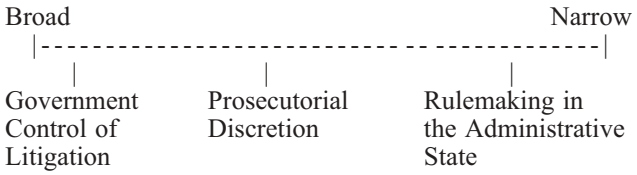
97. *Id*. at 96 (citing United States v. Providence Journal Co., 485 U.S. 693, 706 (1988)).

98. *See supra* notes 74-75 and accompanying text.

VI. Conclusion

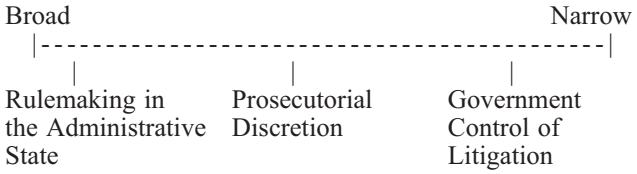
It is possible to frame the issue of whether an intervenor can appeal a district court decision invalidating a federal agency action when the government chooses not to appeal as one of executive branch authority (see Figure 2).

Figure 2—Executive Branch Authority



Doing so places the issue within the context of a larger, ongoing debate about the relative power of the executive branch. Alternatively, the issue may be framed as one of the rights of intervenors, that is, whether a party that can demonstrate harm as a result of a district decision respecting a federal agency action has the right to appeal that decision irrespective of the decision of the United States respecting appeal (see Figure 3).

Figure 3—Rights of Intervenors



Doing so places the issue within the context of a larger, ongoing debate about individual rights.

Whether the issue is framed as one of executive branch authority or the rights of intervenors need not be outcome-determinative. But it certainly is likely to impact one's perception of the issue. Irrespective of the doctrine that the courts of appeals—and ultimately, the Court—accept, the issue can be expected to have ramifications that extend beyond the scope of particular agency actions at issue. Given the fact that many environmental controversies involve multiple parties with incongruent interests, the matter may arise frequently in the context of environmental law and have a disproportionate impact in that field of law. For a number of years to come, it is possible that this matter will impact the legal doctrines of intervention, standing, and prosecutorial question. More generally, it may signal the willingness of the judiciary to provide the executive broad authority to end litigation and thereby lessen stakeholder access to the courts to seek to redress harm that results from lower court decision's invalidating federal agency actions.